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In the Supreme Court of the United States

OCTOBER TERM, 1965

NO. 298

DANIEL CONSTRUCTION COMPANY, INC., *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

and

UNITED ASSOCIATION OF JOURNEYMEN, AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Daniel Construction Company, Inc., a corporation, petitions for a writ of certiorari to review the judgment and decree of the Court of Appeals for the Fourth Circuit entered in this case on January 11, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals enforcing the Board's Order (App. 8, *infra*, pp. 20-39) is reported at 341 F. 2d 805. The opinion denying the Petition for Rehearing filed by Daniel Construction Company, Inc. is contained in App. C, *infra*, p. 40.

The findings of fact, conclusions of law, and order of the Board (App. D, *infra*, pp. 41-78) are reported at 145 NLRB 1397. The Decision and Direction of Election of the Board (App. E, *infra*, pp. 79-84) is reported at 133 NLRB 264.

JURISDICTION

The Court of Appeals entered its judgment on January 7, 1965 (App. B, *infra*, pp. 20-38) and denied the petition for rehearing filed by Daniel Construction Company, Inc. (App. C, *infra*, p. 40) on March 29, 1965. The final decree was entered January 11, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10 (f) of the National Labor Relations Act, 29 U.S.C. 160 (f).

QUESTIONS PRESENTED

1. Whether the decision that the speeches made by Company officials during a union organizational effort were in violation of the National Labor Relations Act, as amended, even though the expressions contained no threats of reprisals or force or promises of benefits, is in direct conflict with Section 8 (c) of the Act and a denial of Constitutional right to freedom of speech.

2. Whether the decision of the National Labor Relations Board which permitted persons who were not employed by the Petitioner to participate as voters in a representation election is patently contrary to the express provisions of the Act and as such subject to court review.

STATUTE INVOLVED

The pertinent sections of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 16-19).

STATEMENT

I

THE BOARD'S REPRESENTATION PROCEEDING

On February 24, 1961, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (hereinafter called the union), filed with a Regional Director of the Board a representation petition under Section 9 of the Act requesting certification as the bargaining agent for the mechanical

employees[1] of the Greenville Division of Daniel Construction Company, Inc. (hereinafter called Daniel). After the hearing, the Board issued its Decision and Direction of Election. In designating the voting eligibility requirements, the Board ruled that in addition to the employees currently employed, anyone who had formerly been employed by the employer in this craft for as much as 30 days within the preceding 12 months, or who had "some" employment in that period and who had been employed as much as 45 days within the preceding 24 months would be allowed to vote. (App. E, *infra*, pp. 79-84).

At the ensuing representation election held on November 16, 1961, 347 valid ballots were cast for and 684 against the union.[2] Of the total ballots counted 337 were cast by individuals who were not employees on the payroll and were not working for Daniel on the election date but whose voting eligibility was based upon the other criteria in the formula stated by the Board in its Decision and Direction of Election.

Objections to the conduct by Daniel allegedly affecting the results of the representation election were filed subsequent to the election by the union.

II

THE BOARD'S CONCLUSION AND ORDER

Subsequent to the election, the union also filed unfair labor practice charges based upon which a Regional Director of the Board issued a complaint on March 5, 1963, therein ordering consolidation of the representation case objections with the unfair labor practice case for hearing before a trial examiner of the Board. After the hearing before the trial examiner and his Intermediate Report, the Board issued its Decision and Order on January 31, 1964, substantially agreeing with the trial examiner, finding that Daniel had committed pre-election Section 8 (a) (1) violations which had also interfered with the employees' freedom of choice at the representation election. Therefore, the Board ordered that Daniel cease

[1] The term mechanical employees includes pipefitters, plumbers, welders and their helpers.

[2] 245 ballots were disallowed upon challenge and 67 challenged ballots were never ruled upon.

and desist from the unfair labor practices and that the prior election be set aside and a new one held.

III

THE DECISIONS OF THE COURT OF APPEALS

Subsequent to the Board decision, Daniel filed a petition for review with the Court of Appeals asking that the Board's Decision be set aside.

Daniel asserted in its petition for review that the record was barren of substantial evidence to support the Board's findings in the unfair labor practice case, while the Board cross-petitioned to have its cease and desist order enforced. The sharply divided Court in a two to one Decision, denied Daniel's petition in this respect and enforced the Board's order on the ground that the record contained substantial evidence to support, *inter alia*, the finding that the pre-election speeches to employees delivered by Daniel executives, Mickel and Johnson, were in violation of Section 8 (a) (1) of the Act even though failing to find that the expressions themselves contained threats of reprisal or force or promise of benefit.

The Court below denied the petition by the union to modify the Board's order in the unfair labor practice case to include additional 8 (a) (1) violations where the Board had found none.

On March 8, 1965, Daniel filed with the Court of Appeals a petition for rehearing on the ground that pre-election speeches made by officials of Daniel to the employees came within the ambit of Section 8 (c) of the Act as well as within the Constitutional right of freedom of speech, and that therefore these speeches could not form the basis of 8 (a) (1) violations. The petition for rehearing contained the additional ground that the Court should have granted review of the Board's Decision and Direction of Election since the voter eligibility provision of the Board's decision was contrary to the express provisions of the Act. The Court below denied the petition for rehearing and a decree was entered on January 11, 1965.

ARGUMENT

INTRODUCTORY

The statutory and Constitutional right of freedom of speech is no less clear to an employer than to others of our citizenry. The denial of such rights to the employer encroaches upon our liberties and our freedoms equally as much as their denial in other instances and under other circumstances. The decisions below constitute just such encroachments which warrant the redress of this Court. Daniel has in effect been ordered by the Court below to cease and desist from doing that which it has a right to do pursuant to Section 8 (c) of the Act and which it has an even more fundamental right to do pursuant to the First Amendment to the Constitution of the United States.

Coupled with this derrogation of Petitioner's rights under the Act and the Constitution, is the error of the Court below in summarily failing to review the Decision and Direction of the Board wherein the Board has exceeded its statutory bounds by permitting individuals other than employees, as they have been statutorily and otherwise defined, to vote in an election.[3]

This case raises key issues in labor relations and other areas of law because there has been both a misinterpretation of Section 8 (c) by the Board and the Court, and a misapplication of the principle laid down by this Court in *Leedom v. Kyne*, 358 US 184 (1958). The urgency for clarification and for restoration of rights is self evident in view of these issues of constitutional dimension, which have not been, but should be settled by this Court, and in view of the misapplication of this Court's *Kyne* principle. Furthermore, the Board's decision is such a flagrant abuse of its authority that it demands Court repudiation. This Court recently stated in its decision in *NLRB v. Brown*[4], that

> ". . . reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory

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[3]In the dissenting opinion of the Court below it was stated that this Board's action was "ex facie arbitrary, capricious and contrary to the definition of 'employee' under Sect. 2 (3) of the Act . . . ." and "flagrantly invalid stretching of the franchise . . . ."

[4]85 Supt. Ct. 980 (April 1965).

mandate or that frustrate the congressional policy underlying a statute."

The decision in this case which holds that a speech may be coercive even though the words themselves contain no threats of reprisal or force or promise of benefit is in sharp conflict with the decisions of other courts of appeal on the same matter. The Court below has erroneously relied upon *NLRB v. Federbush Co., Inc.*, 121 F. 2d 954 (2 Cir. 1941) as authority for its finding of violation while no other court of appeals would consider *Federbush* presently applicable law.

I. *The Decision that the Speeches made by Messrs. Mickel and Johnson Were in Violation of the National Labor Relations Act, as Amended, Is in Direct Conflict with Section 8 (c) of the Act and a Denial of Petitioner's Right to Freedom of Speech.*

There has long been a great deal of controversy over whether an employer had the right to express his views to his employees without violating the Act. Since its inception, the National Labor Relations Board (hereinafter referred to as "the Board") has attempted to prevent employer communication with employees on the subject of unions, collective bargaining and the potential consequences thereof.

In the early 1940's the United States Supreme Court rendered two decisions which clearly established the right of free speech on the part of an employer.[5] In these decisions the Court upheld the right of an employer to speak up against unionization and to point out some of the consequences which might flow therefrom, such as strikes and unrest.

However, the issue of employer free speech continued to be a controversial subject in labor cases. In 1947 Section 8 (c) was put into law by Congress in order to specifically protect that right. The Section reads as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under *any* of the provisions of this Act, *if such expression* con-

[5] *NLRB v. Virginia Electric & Power Co.*, (1941), 314 US 469; *Virginia Electric & Power Co. v. NLRB*, (1943), 319 US 533.

> tains no threat of reprisal or force or promise of benefit." (Emphasis added)

It is important to note that an effort was made during the congressional deliberations of Taft-Hartley to add "under all circumstances" to Section 8 (c), but this effort was rejected.

The importance which Congress has attached to 8 (c) is further emphasized by the fact that the Landrum Griffin Act provides "nothing contained in this section shall be construed as an amendment to, or modification of, the rights protected by Section 8 (c) of the National Labor Relations Act, as amended."[6]

The Court below in its decision in this case is directly contrary to the express terms of Section 8 (c), which Congress reaffirmed in Section 203 (f) of Landrum-Griffin. The very proposition in *NLRB v. Federbush Co.*[7] which the Court of Appeals quotes and upon which it relies to heavily is erroneous[8] The paragraph previous to that quoted in the opinion of the Court below reveals the erroneous basis, in light of 8 (c), upon which that decision rests. There the Second Circuit stated:

> "Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and *pro tanto* the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment."

This is precisely what Congress intended to prevent when it

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[6]Sect. 203 (f) Labor-Management Disclosure Act of 1959, 29 USC 433 (f).

[7]121 F. 2d 954, 957 (2 Cir. 1941).

[8]"Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first."

enacted Section 8 (c).[9] This section clearly provides that the expressions themselves must contain threats or promises in order to be unfair labor practices. The Court below in *Federbush*

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[9] *H. Rep.* 3020, 80*th Cong., 1st Sess., Section* 8 (*d*). "Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act: (1) Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, if it does not by its own terms threaten or force economic reprisal.***"

H. Rep. 245, 80*th Cong., 1st Sess., p.* 33. "This guarantees free speech to employers to employees, and to unions. Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely. Thus if an employer criticizes a union and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but 'infer,' from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay. It has similarly abused the right of free speech in abolishing and penalizing unions of which it disapproved but which workers wished as their bargaining agents. The bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, *standing alone*, is unfair within the express terms of Sections 7 and 8 of the amended act."

S. Rep. 105, 80*th Cong., 1st Sess., pp.* 23-24. "*Another amendment to* this section would insure both to employers and labor organizations full freedom to express their views to employees on labor matters, refrain from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas v. Collins* (323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case (134 F. 2d 993, 146 A. L. R. 1017). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance*, 69 NLRB 247) or if the speech was made in the plant on working time (*Clark Brothers*, 70 NLRB 60). The committee believes these decisions to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence."

H. Rep. 510, 80*th Cong., 1st Sess., p.* 45. "Both the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech. The conference agreement adopts the provisions of the House bill in respect with one change derived from the Senate amendment. It is provided that expressing any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, is not to constitute or be evidence of an unfair labor practice if such expression contains no threat of force or reprisal or promise of benefit. The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination."

ruled that the Board could "measure" statements which were "legitimate enough as such" against the fact that when an employer utters them "they have a force independent of persuasion." When Congress enacted Section 8 (c) requiring that the statements themselves must be violative of the Act this authority to "measure" other factors against the statements was removed. 8 (c) forecloses the considerations upon which the Board and Court decisions in *Federbush* were based. ***But the same considerations were utilized erroneously in the present case.***

The effect of the decision in this case is to nullify, for all practical purposes, Section 8 (c). In essence, the Court of Appeals has held that while each statement considered alone would be protected by 8 (c), the whole loses that protection and becomes a violation of the Act. This is the holding in spite of the fact that the expressions themselves contained "no threat of reprisal or force or promise of benefits . . .". The effect of the decision is to revive the pre-Taft-Hartley interpretation of the employer's right of free speech under the Act.

While the Court below did not specifically rule upon the point, the legality of each of the "expressions" is clearly established in virtually every circuit.

(*a*) *Loss of employment if company unionized:*

The Circuit Court of Appeals for the Sixth Circuit in *Union Carbide v. NLRB*, (1962), 310 F. 2d 844, held that similar statements were guaranteed specifically by Sect. 8 (c). See the following case where similar statements were held protected free speech under Sect. 8 (c) of the Act; *NLRB v. Transport Clearings, Inc.*, (1962 - 5 Cir.), 311 F. 2d 519; *NLRB v. Associated Dry Goods Corp.*, (1954 - 2 Cir.), 209 F. 2d 593; *NLRB v. O'Keefe & Merritt Mfg. Co.*, (1949 - 9 Cir.), 178 F. 2d 455; *NLRB v. Armco Drainage & Metal Products*, (1955 - 6 Cir.), 220 F. 2d 573; *NLRB v. Rockwell Mfg. Co.*, (1959 - 3 Cir.), 271 F. 2d 109; *Bilton Insulation, Inc. v. NLRB*, (1961 - 4 Cir.), 297 F. 2d 141; *Henry I. Siegel Co., Inc. v. NLRB*, (1964 - 2 Cir.), 328 F. 2d 25; and *NLRB v. Enid Cooperative Creamery Assn.*, (1948 - 10 Cir.), 169 F. 2d 986.

(b) *Firm intention in the future to maintain existing practices of hiring at the gate*:

In the decisions of the Court of Appeals for the Fourth Circuit in *NLRB v. W. T. Grant Co.*, (1953), 208 F. 2d 710, a statement by the store manager to employees on the evening before the election that "the employees would not be benefited by joining the Union because the company operated the store in accordance with the Grant store manual covering numerous stores in the Grant system, and would continue to do so regardless of what the union might demand," was held to be protected free speech under Sect. 8 (c) of the Act. Even under the Wagner Act such so-called "anticipatory refusal to bargain" statements were held to be free speech. In this regard, see *NLRB v. American Tube Bending Co., Inc.*, (1943 - 2 Cir.), 134 F. 2d 993, which held that employer's statement that he would continue an open-shop policy no matter whether the union won the election or not, was protected free speech. Also see *NLRB v. Blossom Products Corp.*, (1941 - 3 Cir.), 121 F. 2d 269 (f. n. 1); *NLRB v. Ross Gear & Tool Co.*, (1947 - 7 Cir.), 158 F. 2d 607; *NLRB v. Laars Engineers, Inc.*, (1964 - 9 Cir.), 332 F. 2d 664; and *Decorated Products, Inc.*, (1963), 140 NLRB 131.

(c) *Interminable delay caused by litigation issues raised in the Direction of Election*:

In the case of *W. T. Grant Co.*, (1964), 147 NLRB No. 52, the Board held that the following notice posted on the bulletin board by the Company was protected free speech:

> "It is my opinion as an attorney that this decision is completely wrong. However, there is no appeal from this decision. The only way that this decision of the National Labor Relations Board may be reviewed by the Courts is an extremely complicated one. It would come about in the situation where the union is victorious in the second election. If and when this event happens, the Company would take the position that it is not obligated to bargain with the union because the decision overruling the election and ordering a second election was erroneous. If the union does succeed in winning the second election, the

> Company will most surely appeal the decision ordering the second election."

The language used in this case was certainly as strong as, if not stronger, than that used in the speeches. For similar rulings see *Esquire, Inc.*, (1954), 107 NLRB No. 260; *Aeronca Mfg. Corp.*, (1954), 121 NLRB No. 100; *Westinghouse Electric Corp.*, (1954), 110 NLRB No. 50; *LaPointe Machine Tool Co.*, (1955), 113 NLRB No. 19; and *National Furniture Mfg. Co.*, (1953), 106 NLRB No. 228.

The trial examiner found that the several statements to the employees when considered in combination, constituted a violation of Section 8 (a) (1) of the Act. It is significant that he stated, *inter alia*, that "although any one of these [statements] taken alone might be considered to be the expression of views, argument, or opinion, protected by Section 8 (c) of the Act * * *."[10] Thus, while there was no specific finding made that the statements when viewed separately were permissible and lawful, the implication is clear.

Then, if it is that these statements considered as a whole constitute a violation, attention should be focused upon how this occurs. The expression of the fact that there could be fewer jobs available after unionization due to adverse customer reactions does not relate to or amplify the statement that Daniel intended to maintain the existing practice of hiring at the gate, nor does it relate to or amplify the statement that Daniel intended to litigate the legality of the Board's unit determination which could take as long as ten years. The announcement concerning Daniel's intent to maintain its existing hiring practice does not, in turn, relate to or amplify Daniel's desire to contest the validity of the Board's unit determination.

It becomes apparent that each of these three varities of statements are mutually exclusive and that from the standpoint of semantics, there is no connection or implication either direct or indirect between any of them. The trial examiner, then, by bold stroke of the pen has given a prime example of a *non sequitur* in this respect which the Board has blandly adopted and which the court below has viewed only super-

[10]App. D, *infra*, p. 68.

ficially by incorrect application of *Federbush* (*supra*), directly contrary to Section 8 (c) of the Act and the First Amendment to the Constitution.

II. The Voter Eligibility Provisions Contained in the Board's Decision and Direction of Election Are Patently Contrary to the Express Provisions of the Act and As Such Subject to Review by the Circuit Court of Appeals.

Section 2 (3) of the Act[11] defines the term employee with various qualifications. Section 9 of the Act contains the authority pursuant to which the Board takes its action in representation cases. Paragraph (a) of Section 9 begins by stating: "Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the *employees* in a unit appropriate for such purposes, shall be the exclusive representatives of all the *employees* in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:" (Emphasis supplied).

Thus, when a representation petition is filed, the Board is statutorily limited to concerning itself with the designation or selection made by a majority of the *employees* in an appropriate unit as to their choice of a bargaining representative.

In the instant case the Board has flagrantly disregarded its statutory directives and limitations by describing in its Decision and Direction of Election, the eligible voters to include hundreds of individuals who were neither working for nor on the payroll of Daniel on the date of the election. It has done this by arbitrarily defining those eligible to vote to include those who had worked for Daniel as much as 30 days in the prior 12 months or 45 days in the prior 24 months, regardless of their current status.

Cognizance should be taken of the realities of the construction industry where employees are hired for a particular construction project at the end of which the employees seek other jobs at other construction sites. While it is the exception rather than the rule, the employees may occasionally

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[11] 29 U. S. C. 152(3).

become re-employed by the same employer whenever his current job has ended. Those many employees who do not obtain re-employment by their immediate past employer, gain employment from other employers. The Board in making its determination as to voter eligibility did not have before it any facts to support the eligibility rule which it formulated. It cannot be said that the Board has misapplied or misinterpreted facts as in *Boire v. Greyhound Corp.*[12] cited by the Court below. There could have been no erroneous assessment of the particular facts before the Board because the Board considered no facts before it. This has led to a conclusion which not only fails to comport with the law, but which exceeds statutory power.

This disregard for statutory limitation has not resulted in what might be considered negligible error which should await adjustment at some later opportunity in the chain of available remedies. There were a total of 1031 voters[13] and about one-third of them were permitted to vote without any real basis of employee relationship to Daniel. Inevitably, the true employees of Daniel have gained knowledge that approximately one out of every three ballots cast in a second election will be cast by individuals who may be working for other employers, who may be working far distances from any of Daniel's job sites, and who do not know the day to day circumstances confronting the Daniel employees at Daniel job sites. Undoubtedly, a free choice is not available to Daniel employees under these circumstances because they will be aware of the watered down effectiveness of their designations. This is not the type of election envisioned by statutory provisions within which the Board has authority to direct.

In *Leedom v. Kyne*[14] this Court permitted a federal district court to vacate a determination of the Board made in excess of its power. In the *Kyne* case however, the evil was not even as great as it is here, for only 9 non-professional employees were permitted to vote with 233 professional employees. Here approximately 337 non-employees are being permitted to vote with approimately 694 employees.

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[12]376 U. S. 473 (1964).
[13]Exclusive of those whose ballots were rejected or challenged.
[14]358 U. S. 184 (1958).

So that there is complete clarity of Daniel's position—this is not a request to seek federal court review of a Board's representation determination; to the contrary, this is, as it was in *Kyne*, a plea to ". . . strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition of the Act." The prohibition which the Board has violated is that of including a large percentage of non-employees to vote contrary to the definition of "employee" in Section 2 (3) and contrary to the limitations of Section 9 of the Act. The dissent in the court below correctly characterized the Board's conduct in this respect as "*ex facie* arbitrary, capricious and contrary to the definition of 'employee' under Sect. 2 (3) of the Act . . ." and ". . . flagrantly invalid stretching of the franchise . . ."

The fact that *Kyne* was brought in a federal district court and that this appeal was lodged by Daniel in the Court of Appeals is not a distinguishable feature which would result in the denial of jurisdiction. Section 10 (e) and (f) of the National Labor Relations Act provide for review, in the appropriate court of appeals, of a final Board order entered in an unfair labor practice proceeding under Section 10. The Act also refers to court review of Section 9 representation proceedings in Section 9 (d) when a Board order in an unfair labor practice proceeding is based in whole or in part upon the findings in a representation proceeding and where that Board order is before the court of appeals under Section 10 (e) or (f). This appellate procedure has direct application to the instant case. There has been an adversary hearing before a trial examiner in which the rules of evidence controlled to the extent applicable and in which all parties were permitted to fully participate pursuant to Section 102.38 and 102.39 of the Board's rules and regulations, Series 8, as amended. As a result of that litigation the trial examiner issued his Intermediate Report based upon which the Board issued its Decision and Order which fully encompassed the objections to the representation election and the direction that a second election be held. Furthermore, the case came before the court below under Section 10 (f) of the Act. Therefore, the court of appeals

has jurisdiction to review the question of whether the Board has acted in excess of its statutory authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1965

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

Sec. 8. (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit, is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is

appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10. (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect

to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same

manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9347.

Daniel Construction Company, Inc.,
Petitioner,

versus

National Labor Relations Board.
Respondent.

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

No. 9414.

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO,
Petitioner,

versus

National Labor Relations Board,
Respondent.

Daniel Construction Company, Inc.,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued September 30, 1964. Decided January 7, 1965.)

Before FAHY,* BRYAN and J. SPENCER BELL, Circuit Judges.

No. 9347, Robert T. Thompson and Knox L. Haynsworth, Jr., (Thompson, Ogletree and Haynsworth on brief) for Daniel Construction Company; Melvin Pollack, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General

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*Of the District of Columbia Circuit, sitting by designation of the Chief Justice.

Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Margaret M. Farmer, Attorney, National Labor Relations Board, on brief) for National Labor Relations Board; and Patrick C. O'Donoghue (O'Donoghue & O'Donoghue and Martin F. O'Donoghue, Jr., on brief) for United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO.

No. 9414, Patrick C. O'Donoghue, Martin F. O'Donoghue, Jr., and O'Donoghue & O'Donoghue on brief for Petitioner; Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Melvin Pollack and Margaret M. Farmer, Attorneys, National Labor Relations Board, on brief for Respondent, and Robert T. Thompson, Knox L. Haynsworth, Jr., and Thompson, Ogletree and Haynsworth on brief for Intervenor.

J. SPENCER BELL, Circuit Judge:

Petitioner, Daniel Construction Company (hereinafter Daniel), has lodged this appeal to have us review and set aside two orders of the National Labor Relations Board. The first is a cease-and-desist order which rests upon a NLRB determination that the company has interfered with, restrained, and coerced its employees in violation of section 8(a)(1) of the National Labor Relations Act, as amended (hereinafter the Act).[1] The primary contention of the company regarding this order is that there is no substantial evidence in the record considered as a whole to support a finding

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[1] 29 U.S.C.A. § 151 et sequi.

that it has committed unfair labor practices. The second order to which Daniel objects is one directing that a new representation election be conducted for Daniel employees.

In order to fully understand the issues raised by this appeal, certain background facts should be stated. The record indicates that Daniel is a large South Carolina corporation engaged in the building and construction industry as a general contractor. In 1961 it was the second largest industrial contractor in the United States, with extensive domestic and foreign operations. At that time the company was divided into five divisions, the largest of which was the Greenville Division which employed some 6,000 workers on projects scattered throughout Florida, Georgia, Alabama, Tennessee, and the Carolinas.

On February 24, 1961, a petition was filed by the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry in the United States and Canada, AFL-CIO (hereinafter the union) requesting certification as the bargaining agent for the Daniel mechanical employees[2] working for the Greenville Division. After the appropriate hearings, a representation election was ordered held on November 16, 1961; at this election the union was defeated by a vote of 684 to 247.[3] On February 8, 1962,

[2] This group included the pipefitters, plumbers, welders, and their helpers.

[3] Included in these vote totals are ballots from 337 individuals who were not in the employ of Daniel on the day of the election but who were determined by the Board as included in the appropriate bargaining unit because they had worked for the company for as much as 30 days during the preceding 12 months or 45 days during the preceding 24 months and some time during the preceding 12 months.

the union filed both unfair labor practice charges and objections to conduct by Daniel affecting the result of the representation election.[4] After due consideration the Regional Director recommended that a hearing be held on certain of the objections to conduct; he also ordered that a complaint be issued on some of the unfair labor practice charges. Since substantially the same conduct was involved in both the election conduct objections and the unfair labor practice charges, the Board on March 5, 1963, over the protest of Daniel, ordered the consolidation of the representation case and the unfair labor practice case for a hearing before a trial examiner.

On January 31, 1964, after a hearing and the subsequent issuance of an Intermediate Report by the trial examiner in the consolidated case, the NLRB, agreeing mostly but not completely with the trial examiner, found that certain pre-election conduct of the company constituted violations of section 8(a)(1) of the Act and ordered Daniel to cease and desist therefrom. The Board found further that the Daniel conduct in issue had interfered with the employees' freedom of choice at the representation election, and it, therefore, ordered that the prior election be set aside and that a new election be held when the coercive employer interference ceased. On February 3, 1964, Daniel filed a petition of appeal seeking a review of both aspects of the Board decision in the consolidated case.

I.

[4] The objections to conduct were part of the representation case which began with the union's petition for certification. This was styled Case No. 11-RC-1453 by the NLRB. The unfair labor practice case began when the union filed the unfair labor practice charges after the election. This case was identified by the Board as Case No. 11-CA-1893.

We deal first with the appeal from the Board's order in the representation case that a new election he held and the challenge by Daniel as a part of that appeal to the legality of the company unit determined by the Board as the appropriate one for collective bargaining purposes. We dismiss the petition of appeal insofar as it concerns a review of the representation case orders, since we think it clear that this court is without jurisdiction at this time to review the NLRB orders in that case. *AFL* v. *NLRB*, 308 U.S. 401. 406, 409 (1940); *NLRB* v. *IBEW*, 308 U.S. 413 (1940). Only with respect to final orders of the Board in unfair labor practice cases has Congress, by section 10(f) of the Act, seen fit to expressly authorize judicial review, and we do not read section 9(d), the only subsection of that section of the Act dealing particularly with representation proceedings which even refers to judicial review, as expanding by implication the scope of appellate jurisdiction created by the express statutory provision. Section 9(d) merely provides that when review is sought in an unfair labor practice case which is based in whole or in part upon a Board certification in a representation case, the record in the representation case shall be included in and considered by the court as an integral part of the entire record in the unfair labor practice case. Neither the Taft-Hartley Act nor the Administrative Procedure Act has enlarged the Wagner Act provisions for appellate review of NLRB orders. *Timkin-Detroit Axle Co.* v. *NLRB*, 197 F.2d 512 (6 Cir. 1952); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183, 186 (4 Cir. 1948). To the contrary, in the course of enacting the Taft-

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[5] "The direction for an election is but a part of the representation proceeding authorized by § 9(c) and is no more subject to review under § 10(f) than is a certification which is the final step in such a proceeding and which we have just held [in *AFL* v. *NLRB*, 308 U.S. 401] Congress has excluded from the review afforded by that subdivision." 308 U.S. at 414-15.

Hartley Act, Congress expressly rejected a House proposal which would have permitted judicial review of Board orders in representation cases. See 93 CONG. REC. 6444 (1947) (remarks of Senator Taft).

The cases make it abundantly clear that there can be no review under section 9(d) of the Act of Board action in a representation case until the Board has issued an order which requires the employer to do something predicated upon the results of an election. *NLRB* v. *Falk Corp.*, 308 U.S. 453, 459 (1940); *E. I. Du Pont de Nemours & Co.* v. *NLRB*, 116 F.2d 388, 401 (4 Cir. 1940), *cert. denied*, 313 U.S. 571 (1941). The consolidation of the representation and unfair labor practice cases by the Board here cannot help the petitioner, since that administrative act cannot confer jurisdiction upon this court to review the orders in the representation proceeding now when no such jurisdiction exists under the governing statute. *Hendrix Mfg. Co.* v. *NLRB*, 321 F.2d 100, 106 (5 Cir. 1963); *NLRB* v. *La Salle Steel Co.*, 178 F.2d 829, 832 n.1 (7 Cir. 1949), *cert. denied*, 339 U.S. 963 (1950). Nothing in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), the case relied upon by Daniel as supporting appellate review of the Board action in the representation case at this stage of the proceedings, alters the principles stated above. The Supreme Court was careful to distinguish, with the following language, its decision there from the accepted interpretation of the statutory limitations upon appellate review of NLRB orders in representation cases:

> "This suit is not one to 'review' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated

powers and contrary to a specific prohibition in the Act." 358 U.S. at 188.

Our decision here does not deny Daniel its day in court on the objections which it has raised to the Board's determinations in the representation proceeding; it merely forecloses Daniel from raising those objections on *this* day in court. Daniel will be entitled to a review of the Board action in the representation case if the following succession of events occur: the union wins the new election and is certified by the NLRB as the bargaining agent for the employees in question, the company thereafter refuses to bargain with the union because it feels the election was defective in some way, and the Board in a subsequent unfair labor proceeding adjudges the company to be in violation of section 8(a)(5) of the Act and orders it to bargain with the union as certified. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477 (1964); *NLRB* v. *Falk Corp., supra; Volney Felt Mills* v. *LeBus*, 196 F.2d 497 (5 Cir. 1952).

II.

We turn next to the assertion by Daniel that the record is barren of substantial evidence to support the Board's findings in the unfair labor practice case. The Board found that Daniel had violated section 8(a)(1) of the Act by the following conduct:

1. Coercive pre-election speeches delivered by Executive Vice President Buck Mickel and Mechanical Department Manager Ted Johnson to assembled groups of employees at various job sites.

2. Instructions given prior to the election by Daniel supervisory personnel to three foremen at the American

St. Gobain project to talk to their men concerning the union, to find out how they were going to vote, and to report back.

3. Interrogation of employees at three of the major construction projects by Daniel foremen and/or other supervisory personnel about their feelings regarding the union and the forthcoming election.

4. Several secret pre-election polls conducted by foreman Archie Stringer among the members of his crew at the Bowaters project.

5. Threats of reprisal for union activities made by several Daniel supervisory personnel to employees Jess Humphreys, James Medlock, and Nathan Harrison.

Both in its brief and in oral argument before this court, Daniel has raised a variety of defenses which, if accepted, might require a reversal of the Board's decision. Since these defenses can be considered appropriately only in the context of specific conduct, we proceed to a seriatim discussion of the Board's findings regarding the unfair labor practices.

A. The Speeches

It is undisputed that Vice President Mickel and Mechanical Department Manager Johnson made visits to the larger Daniel job sites in the Greenville Division to speak to the employees during a period of approximately six weeks preceding the election. The testimony indicated that about 15 projects were visited and that between 25 and 30 speeches were made in which support for the company was solicited.

While the speakers did not use a prepared text, it appears that all the speeches were substantially the same and that each one contained these three main points: (a) that there would be a loss of employment if this division of the company was unionized (supposedly because of adverse customer reaction) but continued employment if the workers rejected the union; (b) that the company firmly intended in the future to maintain the existing practice of hiring solely at the gate by individual supervisors at each construction site, regardless of the outcome of the election; and (c) that even if the union were victorious, there would be an extended delay in recognizing it as the bargaining agent because the company planned to contest the legality of the election, with the result that the outcome might not be finally settled for as long as ten years. The trial examiner rejected the company's assertion that these statements were protected expressions within the meaning of section 8(c) of the Act; he found the speeches, considered as a whole, to be coercive, and he stated that finding in these words:

> "Although any one of these [statements] taken alone might be considered to be the expression of views, argument, or opinion, protected by Section 8(c) of the Act, they, in my opinion, as a cohesive combination presented to the voters, tended to restrain employees in the exercise of their right to vote freely by instilling in them a foreboding of damage through loss of employment if the Union were selected, as contrasted with maintenance of present employment and securing of future jobs through familiar, and friendly foremen if the Union were rejected, all coupled with consistent stress on the futility of the election because of Respondent's [Daniel] intention to keep its present hiring practices regardless of the outcome, and to litigate the

> issues for a decade, in any event. Respondent's campaign, as I see it, cannot be viewed as merely a restrained expression of its legal position, or a prediction of the economic consequences of unionism imparted to employees in a noncoercive manner. I find in Respondent's speeches a threat to the economic security of the employees for which Respondent must take the responsibility even though the loss of employment was attributed to adverse customer reaction, and implied promises of favorable treatment on future jobs, if the employees rejected the Union in the election."

The Board accepted the examiner's finding and conclusion on this point without discussion. Daniel here has argued at great length that each of the pre-election statements considered separately is lawful and that this being so, a combination of these statements could not result in illegal speech. Daniel's basic proposition, simply stated, is that the whole cannot be greater than the sum of its parts. Even if we assume that each of the key statements in the Daniel speeches considered separately would be lawful (neither the examiner nor the Board made a ruling to this effect), it still does not follow that we must accept the proposition pressed upon us by the company. Daniel may have accurately stated an accepted rule of mathematics, but words and speech are not governed entirely by mechanical mathematical concepts. Words and phrases, each lawful when considered alone, can be united in such a fashion as to yield an improper end product. As Judge Learned Hand observed more than two decades ago:

> "Words are not pebbles in alien juxtaposition: they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all

> in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first." *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2 Cir. 1941).

Furthermore, we think it settled that whether an employer has employed language which is coercive in its effect is a question essentially for the specialized experience of the NLRB. *NLRB* v. *Brown-Dunkin Co.*, 287 F.2d 17, 18 (10 Cir. 1961). The Board here concluded that the cohesive combination of the Daniel statements about future events resulted in employee coercion, and the record before us contains ample substantial evidence to support such a finding.

B. Coercive Instructions to Foremen

The trial examiner and the Board found that Daniel violated the Act by giving coercive instructions to several of its foremen at the American St. Gobain project. There was credited testimony that three foremen—Bayless Long, Jack Eades, and Homer Lane—had been instructed by their superiors to determine from conversations with their men how the employees were going to vote in the election and to report this information back to Daniel supervisors. It would appear from the record that none of the foremen followed the instructions, and foremen Eades and Long openly informed their men what had been requested of them. The mere fact that the instructions were not followed,

however, does not preclude a finding of coercion, for a disclosure to employees that management has set in motion a chain of events to ascertain and identify union adherents can clearly restrain their freedom in expressing their sentiments regarding organization. *NLRB* v. *Wix Corp.*, 309 F.2d 826, 839 (4 Cir. 1962). Nor is the possible coercion in the "spying" technique requested here destroyed because these foremen were union members, as the company asserts. Foremen for Daniel, regardless of their union affiliation, exercised supervisory functions—assigning and directing work, recommending pay raises, and determining layoffs. With respect to the company argument that it was not responsible for the conduct of its foremen who belonged to the union, the NLRB observed that "not only were [these] foremen agents of Respondent when they engaged in misconduct but . . . they were acting under express authorization of management . . . ." We think there is substantial evidence in the record to support a finding of employee coercion from the instructions to the foremen, and we affirm the Board on this point.

C. Employee Interrogation

The trial examiner credited testimony that five employees were questioned by Daniel supervisory personnel about the upcoming election; some of these employees were asked how they personally felt about the election. Some of the supervisors denied having made the inquiries attributed to them, but it is the responsibility of the Board, and not this court, to resolve factual conflicts in the testimony and questions of the credibility of witnesses. *NLRB* v. *Lester Bros., Inc.*, 301 F.2d 62, 68 (4 Cir. 1962).

Even conceding the existence of employee interrogation, Daniel asserts that interrogation is not per se unlawful and

that whether it violates the Act depends upon the particular factual situation in a given case. Such appears to be the law. *NLRB* v. *Prince Macaroni Mfg. Co.*, 329 F.2d 803, 806 (1 Cir. 1964); *NLRB* v. *Power Equip. Co.*, 313 F.2d 438, 440, *modified on another point*, 319 F.2d 861 (6 Cir. 1963); *Lincoln Bearing Co.* v. *NLRB*, 311 F.2d 48, 50-51 (6 Cir. 1962). Such a legal standard does not change the result here, however, for, considering the questioning of and the discussion with the employees in this case against the total background of facts and circumstances, there is substantial evidence to support a finding by the Board that such conduct was coercive and thus illegal. The considerations to which Daniel has directed our attention—that the interrogation was not coercive because the conversations in some instances were with close personal friends of the supervisor who not only were not intimidated by his remarks but who argued the union side with him, that in any case the statements made were only the personal opinion of the speaker, that the questions about the election and union feelings were generally vague, ambiguous, and occasional rather than specific and persistent, etc.—were matters to be considered along with all the other circumstances present in this case. While they might have been consistent with a finding of no coercion, these factors do not destroy the inference of coercion which the Board could and did draw from the interrogation, considering the other unfair labor practices of which Daniel was adjudged guilty, and they do not require a reversal of the Board on this point.

D. The Pre-election Polls

Prior to the election foreman Archie Stringer conducted three or four secret polls among the members of his crew

at the Bowaters project to ascertain employee support for the union. The trial examiner did not find the conduct to be legally improper, primarily because he found that it was conducted by Stringer as a personal venture and for his own satisfaction. The NLRB reversed the examiner on this point, however, pointing out that several polls were taken, all of them just prior to the election; that the taking of these polls was consonant with the company instructions to some of its foremen to ascertain the union sympathies of the employees; that there was no legitimate basis for these polls; and that they occurred in an atmosphere of company hostility to the union and during a period when Daniel was guilty of several unfair labor practices. The considerations noted by the Board, when considered with the other circumstances in this case, are ample evidence of record to support a finding that a violation of section 8(a)(1) resulted from the conducting of the polls.[6]

E. Threats of Reprisal for Union Activities

The threats of reprisal found by the Board occurred primarily at the C.V.N.P.A. project. However, it was also found that foreman John Denny at the American St. Gobain project advised employee Jess Humphrey, an open union adherent, that "it would be hard to work with Daniel if the Union won the election." At the C.V.N.P.A. site, the examiner found that supervisor Jasper Drum told employee James Medlock that he would never work for Daniel

[6] Since the Board's finding in this respect is supported by substantial evidence in the record, the contrary conclusion of the trial examiner is entitled to no special weight. *NLRB* v. *Thomason Plywood Corp.*, 222 F.2d 364, 365 (4 Cir. 1955).

again if he served as a union observer at the election. There was also testimony that foreman Drum asked Medlock to talk with another employee, Nathan Harrison, and warn Harrison that Mechanical Superintendent Ernest Grigsby was going to run him off the job if he continued to solicit for the union.[8] Finally, it was found by the examiner that foreman Frank Hall and superintendent Grigsby threatened employee Harrison with loss of employment if he continued his union activity.[9]

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[7] Foreman Drum denied ever having made such a statement, but the examiner credited Medlock. In its brief here, Daniel discusses at length the question of Medlock's credibility and the alleged contradictions in his testimony. Daniel charges that Medlock fabricated the whole story, and to support this assertion, its counsel point out that despite the fact that Medlock did serve as an election observer for the union, he not only was not fired but after voluntarily leaving the employ of Daniel, he was later rehired at the C.V.N.P.A. project by Drum. As we have observed earlier, issues of credibility and the resolution of factual controversies are matters for the consideration of the Board, not this court, and we see no need to comment further upon this matter.

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[8] The Daniel position on this particular claim was that such a statement was never made and, alternatively, even if it was, it was merely a warning that the company intended to enforce its no-solicitation rule. Although there was testimony that Harrison had wandered away from his work station to talk with fellow employees on occasion, no Daniel official testified that Harrison was plainly and specifically warned about the no-solicitation rule. Daniel in its brief attempts to construe certain language as containing an implied warning about soliciting on the job, but its position there is tenuous. Moreover, the determination of the intent with which a certain thing is done is a matter for the Board to resolve, and in its resolution of this case, the company's arguments were rejected. We think the Board's determination on this point is supported by substantial evidence in the record.

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[9] The examiner credited testimony that foreman Hall, in the presence of superintendent Grigsby, told Harrison: "If you've got to talk, talk Daniel, Daniel pays your grocery bills and all the rest of your bills; that's what I do. If you think anything of your job that's what you'd better do."

From these findings, especially when viewed in conjunction with the other Daniel conduct, the Board could reasonably conclude that employee coercion occurred. Its finding on this issue is supported by substantial evidence, and we must affirm it.

F. Defense of Isolated Incidents

In view of the foregoing discussion and findings, the asserted defense of isolated incidents hardly warrants serious consideration. Although there were numerous employment sites involved in this election,[10] a majority of the eligible on-the-job voters were employed at four particular projects.[11] Even excluding for a moment the coercive pre-election speeches by Mickel and Johnson, independent coercive conduct was found to have occurred at each of these four large employment sites. Moreover, not only foremen but also high Daniel supervisory personnel were found to have engaged in coercive conduct. Given these circumstances, we dismiss Daniel's isolated incidents defense as without merit.

III.

This court also has before it a petition by the union seeking modification of the Board's order with respect to certain alleged conduct by Daniel supervisory personnel not heretofore mentioned. The trial examiner and the Board

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[10] Daniel maintains that over 50 projects located throughout a six state area were involved, but the NLRB only arranged polling places at 32 job sites because only a few people were employed at a number of Daniel projects.

[11] American St. Gobain (Kingsport, Tenn.), over 140 eligible employees; National Aniline (Irmo, S.C.), 275-300; C.V.N.P.A. (Parr, S.C.), over 100; and Bowater (Catawba, S.C.), either over 130 or 30-50.

rejected the union's contention that Daniel was guilty of other section 8(a)(1) violations because of coercive statements allegedly made by foremen Dale Blevins and Roy Baker and Mechanical Superintendent Arthur McAllister.

There were findings below that the statements attributed to Blevins and Baker (and denied by both of them) were never made and that the statement by McAllister was too ambiguous to constitute a threat of economic reprisal if the employees addressed did not support the union. We think the record contains substantial evidence to support each of these findings, and they are therefore binding upon us. *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 405 (1962); *NLRB* v. *Southland Mfg. Co.*, 201 F.2d 244 (4 Cir. 1952).

IV.

The petition of appeal by Daniel, insofar as it seeks a review of the Board's action and orders in the representation case, is dismissed as not within the jurisdiction of this court at this time.

The petition by the union to modify the Board's order in the unfair labor proceeding with respect to the conduct from which no section 8(a)(1) violations were found is denied.

The petition of the company to set aside the Board's findings and order regarding the unfair labor practices

is denied, and the cross-petition of the Board to enforce its order is granted.

Petition denied and order of the Board enforced in No. 9347; petition denied in No. 9414.

ALBERT V. BRYAN, Circuit Judge, dissenting in part:

The fair and forceful presentation of the case in the majority opinion notwithstanding, I think the Board's determinations of § 8(a)(1) violations should not be accepted. In my judgment there is no foundation of substance in the record for these conclusions.

The condemned deportment of the employer consists of expressions of free speech, specifically allowed by § 8(c) of the Act, 29 USC 158(c), if not a Constitutional privilege. We have indeed come to a servile economic state when it is unlawful for an employer to explain to his employees his reasons for opposing a union. Equally deplorable is the Board's view that ascertainment by the employer of his employees' attitude towards a union is illegal. Even a general inquiry as to how the election might go is denounced. Condemned also is the employer's insistence that despite the election outcome, it would hire its employees at the gate as always—certainly at this stage not an affront to union representation as an anticipatory refusal to bargain.

With these concepts I disagree. The only support for them is the ipse dixit of the Board—scarcely the equivalent of "*substantial evidence*". Texas Industries, Inc. v. N.L.-

R.B., 336 F.2d 128 (5 Cir. 1964); Salinas Valley Broadcasting Corp. v. N.L.R.B., 334 F.2d 604 (9 Cir. 1964); N.L.R.B. v. Calvert Dairy Prods. Co., 317 F.2d 44 (10 Cir. 1963); Lincoln Bearing Co. v. N.L.R.B., 311 F.2d 48 (6 Cir. 1962).

Typical of the unwarrantable inflation by the Board of its powers is the outlawing of the employer's assertion of an intention to litigate a Board ruling. The employer declared its determination to contest the voting eligibility formula promulgated by the Board. Anyone was permitted to vote if he had been employed as much as 30 days in the preceding 12 months or 45 days in the preceding 24 months, although not in the company's employment at the date of the election. Such an enlargement of the electorate is ex facie arbitrary, capricious and contrary to the definition of "employee" under § 2(3) of the Act, 29 USC 152(3), and rightfully subject to protest in pais and in court. Yet for the protest the employer is found guilty by the Board, again on *"substantial evidence"*, of an unfair labor practice.

Despite this flagrantly invalid stretching of the franchise, the vote was overwhelmingly—684 to 247—against the union. This is per se proof, the Board seemingly finds of employer-pressure upon employees to oppose the charging union. To me it is *substantial evidence* that the employees—presumably intelligent—did not want the union.

I would decline to enforce the § 8(a)(1) orders.

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9347

Daniel Construction Company, Inc.,

Petitioner,

versus

National Labor Relations Board,

Respondent,

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO,

Intervenor.

ORDER

Upon a full consideration of the matters discussed in the petition for a rehearing filed in this case by Daniel Construction Company, the petition is denied.

United States Circuit Judge

CHARLES FAHY
United States Circuit Judge

J. SPENCER BELL
United States Circuit Judge

Having dissented, I prefer to abstain from voting on the petition for rehearing.

ALBERT V. BRYAN
United States Circuit Judge

A true copy,
Teste:

Maurice S. Dean, *Clerk,*
U. S. Court of Appeals for the
Fourth Circuit
By Margaret L. Davis, *Deputy Clerk*

FILED
March 29, 1965, *Maurice S. Dean, Clerk*

APPENDIX D

DECISION AND ORDER

On July 18, 1963, Trial Examiner George J. Bott issued his Intermediate Report and Report on Objections to Election in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action. He recommended, further, that the election held on November 16, 1961, in Case No. 11-RC-1453, be set aside and a new election held, as set forth in the Intermediate Report and Report on Objections to Election attached hereto. Thereafter, the Charging Party, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and the Respondent filed exceptions to the Intermediate Report and supporting briefs.[1]

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases, and hereby adops the findings, conclusions,[2] and recommendations of the Trial Examiner with the following additions and modifications:

Respondent contends in its brief that it is not responsible for the actions and statements of its foremen which the Trial Examiner found to be in violation of Section 8 (a) (1) of the Act. Respondent contends that these foremen, most of

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[1]The Respondent filed a request for oral argument. We hereby deny the request because in our opinion the record, exceptions, and briefs adequately set forth the issues and positions of the parties.

[2]In his Report on Objects to Election in Case No. 11-RC-1453 the Trial Examiner considered at length Daniel Construction Company's relationship with the employees on the payroll of Herndon and Smith, Inc., who worked at Daniel Construction's Statesboro, Georgia, job at the time of the election and who were hired by Superintendent Pressly. The Trial Examiner concluded by indicating that he leans strongly to the Union's view that Daniel Construction exerted sufficient control over these employees to be considered their employer. In our opinion the record as set out in the Report on Objections does establish Daniel Construction as an employer, within the meaning of the Act, of the Herndon and Smith employees at the Statesboro job. We also agree with the Trial Examiner's conclusions that Daniel Construction's subcontract to Herndon and Smith had nothing to do with the pending Board election and that the failure to list the Herndon and Smith employees as eligible voters had no restraining effect on other employees.

whom are members of the Union, fluctuate between being journeymen and having foremen status, and have a close personal relationship with journeymen. Therefore, Respondent argues it cannot be held accountable for their interrogation of employees, threats of loss of employment, and similar conduct. We disagree with Respondent.

In Case No. 11-RC-1453 the Board excluded foremen from the unit as supervisors within the meaning of the Act. The record in this proceeding also establishes their supervisory status. Thus Buck Mickel testified that foremen hire employees, a fact repeatedly stressed by Mickel in his preelection speeches. The record shows also that foremen assign work, determine layoffs, recommend pay raises, and have 10 or more employees working under them. Further, the foremen wear white hats, whereas journeymen employees wear green hats, suggesting the clear demarcation between them. Also, the record shows that Buck Mickel encouraged foremen to speak up on behalf of the company. And foremen testified that Respondent's officials instructed them to ascertain how the employees were going to vote. Some foremen communicated these instructions to employees. Further, the conduct of the foremen was the same or similar to other illegal conduct engaged in by higher ranking management officials. In our opinion, these facts show that not only were foremen agents of Respondent when they engaged in misconduct but that they were acting under the express authorization of management, and that, in any event, employees could reasonably believe that they were acting on behalf of management.[3]

We disagree, however, with the Trial Examiner's failure to find that certain conduct of Respondent's foremen violated Section 8(a)(1) of the Act. Thus, Medlock, credited by the Trial Examiner, testified that foreman Drum asked him to talk to employee Harrison and to warn him that he would be run off the job by Superintendent Grigsby if he did not stop soliciting for the Union. Respondent contends that this alleged statement and other statements by

[3] Cf. *Montgomery Ward & Co., Incorporated*, 115 NLRB 645, 647; *Hendrix Mfg. Inc. v. N.L.R.B.*, 321 F. 2d 100 (C.A. 5).

its supervisors to employees were attempts by management to warn employees about violations of Respondent's no-solicitation rule. Without passing on the existence of a valid no-solicitation rule, we find, contrary to Respondent's contentions, that the true reason for this, and other interrogations and threats which the Trial Examiner found to be in violation of Section 8(a)(1) of the Act, was to discourage union support rather than to enforce a no-solicitation rule.[4] Therefore, we find the above threat of reprisal for union activities by foreman Drum to be in violation of Section 8(a)(1) of the Act.

The record also shows that prior to the election foreman Stringer conducted three or four periodic secret polls of the employees in his crew, to determine whether they were for or against the Union. The Trial Examiner found that the poll was not legally improper, because foreman Stringer was a union member; Stringer did it for his satisfaction; the employees participated in it; he was not hostile to the Union; he was not instructed to take the poll; and he did not report the result to higher officials. The Trial Examiner made no mention of the fact that Stringer conducted the poll on three or four occasions. In our opinion, the pertinent considerations are: Respondent's instructions to foremen to ascertain the union sympathies and desires of employees; the hostile atmosphere in which the polls were conducted; the fact that Respondent committed unfair labor practices in its attempt to keep the Union from winning the election; the timing of the three or four polls just prior to a Board-conducted election; and the absence of any legitimate reasons for Respondent's taking upon itself the function of determining the majority or minority status of the Union. In these circumstances, we find that the repeated polls tended to interfere with, restrain, and coerce employees in the exercise of their right to decide freely whether or not to join a labor organization.[5] Accordingly, we find that Respondent violated section 8(a)(1) of the Act through the Stringer polls.

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[4]See *N.L.R.B. v. Idaho Potato Processors, Inc.*, 322 F. 2d, 573 (C.A. 9)
[5]*Becker-Durham, Inc.*, 130 NLRB 1358 1363.

ORDER[6]

The Board adopts as its Order the Recommended Order of the Trial Examiner with the following modifications:

Paragraph 1(e) shall be redesignated Paragraph 1(f). Paragraph 1(e) shall then read as follows:

(e) polling employees to determine their union sympathies and desires in a manner constituting interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

The companion notice provision shall be similarly modified.

Dated, Washington, D. C.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Leedom, concurring:

I find it unnecessary to pass upon the question of whether the speeches by Messrs. Mickel and Johnson violate Section 8 (a) (1) or constitute grounds for setting the election aside. In all other respects, I agree to the 8 (a) (1) violations found and therefore join my colleagues in setting the election aside.

Dated, Washington, D. C.

Boyd Leedom, Member
NATIONAL LABOR RELATIONS BOARD

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[6]The Recommended Order is hereby amended by substituting for the first paragraph therein, the following paragraph:

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, its officers, agents, successors, and assigns, shall:

INTERMEDIATE REPORT, RECOMMENDED ORDER, AND REPORT ON OBJECTIONS TO ELECTION

Statement of the Case

Case No. 11-CA-1893 is before me pursuant to a charge filed February 8, 1962, by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, herein called the Union, and a complaint issued by the General Counsel on March 5, 1963, alleging violations of Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act. Case No. 11-RC-1453 began with a petition for certification filed by the Union on February 24, 1961, upon which the Board issued a Decision and Direction of Election on September 21, 1961. Subsequently an election was conducted which the Union lost. The Union filed objections to conduct affecting the results of the election held on November 16 and 21, 1961, and the Board, on February 6, 1963, directed a hearing on some of the Union's objections and authorized said hearing to be consolidated with the hearing in Case No. 11-CA-1893. On March 5, 1963, the Regional Director of the Board issued an order consolidating the cases and set them for hearing. A hearing in the matter was held before me in Kingsport, Tennessee, on April 22, 23 and 24, 1963, and in Greenville, South Carolina, on May 7, 8, 9 and 10, 1963. All parties were represented at the hearing and, subsequent to the hearing, filed briefs which I have considered.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's business

Daniel Construction Company, Inc., a South Carolina corporation with its principal office in Greenville, South Carolina, is engaged in the construction of industrial and commercial plants in the Southeastern United States. Respondent annually receives revenues in excess of $100,000 from

projects located outside the State of South Carolina. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) of the Act.

II. The labor organization involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. Speeches to employees

On the date of the election, November 16, 1961, the Company's Greenville division, which is the only division involved, had about 800 unit employees working at its approximately 50 projects. Many of the projects were small, employing only a few employees, and most of the events in this case took place at the Company's major jobsites of which there were about six. At the National Aniline project, Irmo, South Carolina, there were approximately 300 pipefitters at the time of the election, at the American St. Gobain job in Kingsport, Tennessee, about 140, and at the C.V.N.P.A. job in Parr, South Carolina, about 100. The Pittsburgh Plate Glass project, Shelby, North Carolina, the Fibre Industries project, Shelby, North Carolina, and the Bowaters job at Catawba, South Carolina, each employed between 30 and 50 unit employees, and the rest of the on site eligible voters were scattered over the Company's smaller jobs and its warehouse.

Many of the alleged unfair labor practices are asserted to have occurred in speeches given by Buck Mickel, Respondent's executive vice president, and Theodore Johnson, manager of the mechanical department, to assemblies of employees at the various jobsites some time before the election.

Eugene Brock was employed by the Company at the National Aniline project, Irmo, South Carolina, as a general foreman at the time of the election. He was also a member of the Union then and at the time he testified. Brock testified that, about 2 or 3 weeks before the election, Buck Mickel and Johnson addressed a group of employees. Mickel spoke first, and, according to the witness, he described the method by

which the Company had secured the contracts for many of the projects. Mickel said, so Brock testified, that some of the Respondent's customers preferred a nonunion contractor and Respondent felt that it would not get as many jobs if it were union. Brock also recalled that Mickel said the Company would tie the election up in court, whether it won or lost, for a number of years.[1]

All that Brock remembered of Johnson's speech was that Johnson described how employees were hired by the Company.

Johnson, manager of the mechanical engineering department, gave a talk to employees at the Fibre Industries project, on or about November 7, 1961, according to employee James McCowen. Johnson told the employees who had assembled at company instruction that ". . . industry is coming south to get away from the union . . . ," and "we are negotiating a lot of jobs now if we vote to go union we won't get." Johnson added, so McCowen said, that if the Company had been organized it would not have obtained all the jobs it had. Johnson also said that if the Company was not kept nonunion it would not be able to keep as many men employed because the Company operated in many union jurisdictions and the employees, contrary to present practices, would not be permitted to travel and work in all those jurisdictions.

McCowen also testified that Johnson said all the men would have jobs when the present project was over and that company supervisors would make arrangements to keep the men. Johnson promised, so McCowen testified, that Foreman Love, who was going to the Bowater job, would hire anyone who wanted to go with him. Johnson also described the Respondent's hiring procedures and said, according to the witness, that the Company would never hire through a union business agent. Johnson said that the Company had been assured by its lawyers that it could keep "this" in court for 10 years.

Paul Bailey worked at the American St. Gobain job at

[1]Statements about Respondent's plans to litigate the Board's Direction of Election are not alleged to be unfair labor practices but are part of the objections to the election.

the time of the election and heard Buck Mickel, Ted Johnson and Personnel Manager Barrington King talk to the employees on or about November 2, 1961. He testified that

> . . . Mr. Mickel made a speech concerning the employment that we had had previously with the company and that if Daniel Construction Company would remain non-union that we could expect continued employment; that they could bid on contracts for the entire job and not have to sub-contract it; and that they could work the job from beginning to end; and that they wanted the men to consider very closely how they had been treated with the union; and if they were union members; and how they had been treated by Daniel Construction Company; and that when we left Daniel—or when we left this job that we could expect continued employment, if it remained non-union; and he also told us that we would receive our employment through Daniel Construction Company by calling or contacting our foreman, our superintendents. He referred to Mr. John Denny, Mr. Homer Lane who were foremen on the job at the time, that we could contact them for jobs. He referred to all the work that Daniels had, and the pamphlets they had put out on how much work they had throughout the South; and that if it went union that they didn't think they could compete or get as many jobs as they would without being union; and that regardless of how the election went that they would continue as long as they were on a right to work state, to hire their employees through the gate, without coming through a business agent. They also said if the union won this election that they would protest, protest the absentee ballots, and they thought they could keep it in court for from eight to ten years.

Bailey also said that Johnson made a short statement after Mickel. Johnson repeated some of Mickel's points and also said that the Company did not ask a man if he were union or nonunion when he was hired; that Johnson would dismiss any superintendent who did; that the Company hired on the basis of ability and not obligations to a union.

He testified that King said the union was not for the working man; that if the Company were kept nonunion the employees would not have to pay a business agent to keep their jobs and there would be no loss of work because of strikes. King also said that as long as the employees wanted to continue working they could be recommended by their superintendent for employment at another job.

James Medlock, employed at the C.V.N.P.A. project at Parr, South Carolina, testified that Mickel, Johnson and King spoke to the employees before the election. He said that Mickel told the employees that the Company was proud of the mechanical department's record on jobs completed and in process. He testified that Mickel said if the job went union the Company would lose contracts because of it and ". . . that quite a few people, the pipefitters in particular would be looking for work elsewhere." According to the employee, Johnson and King spoke along the same line as Mickel "concerning the contracts they would lose . . . ." The Company's hiring practice was discussed, and the speakers stated that the Company would continue to hire as they always had.

Wallace Poe testified that, while he was employed at the Pittsburgh Plate Glass project before the election, he heard Mickel and Johnson address the employees. He said that Mickel said if the Union won the election the Company would put the matter in court and could keep it there for 10 years. Mickel added that the Company had ". . . just as smart lawyers as the union." According to Poe, Mickel said that there never would be a union contract and that "we would hire just like we've always hired and fired." Poe could not remember exactly what Johnson had to say but stated that he said "about the same thing."

Newell Childers was employed at the Bowaters project, Catawba, South Carolina, during the election. He heard Mickel tell the employees that the Company was ". . . able to secure work from the north and bring it south," because the Company could offer the customers "a package unit." Mickel added that this was also possible because the custom-

ers desired nonunion labor. He also testified that Mickel said that ". . . regardless of how the election went they'd never be organized."

Leonard Bailey, an employee at the American St. Gobain project in November 1961, testified that Mickel said to a meeting of employees that the Company got its work through negotiations instead of bids; that the Company did not have to hire men sent by the business agent of a union; that the employees could look forward to having work in the future with Daniel Construction and could get hired at the jobsite.

Jack Drake heard four company officials talk to employees prior to the election at the National Aniline project but was unable to remember which speaker made a specific remark. He did recall, however, that it was stated by one of the speakers that it made no difference to the speaker whether the men were union or not for they still could be hired by the Company through its hiring procedures. The speaker added that if the Union won the election the Company would still hire at the gate as it had been doing, because the matter would be tied up in court for years. Jurisdictional disputes and pyramiding of overtime on union jobs were mentioned by the speakers and their absence at Daniel suggested as reasons why the Company was able to get work. It was stated that this would not be true if the Company were unionized, and this would affect employment.

Charles Bugg, employed at National Aniline project at the time of the election, testified that Mickel told the employees in a speech that the Company was not going to sign a contract with the Union no matter how the election turned out but would continue hiring as they had in the past.

Harold Free, also employed at the National Aniline project, said that Mickel said ". . . win, lose or draw that Daniels would never negotiate a contract with the union."

Buck Mickel testified that he and other managerial representatives made a tour of various company projects, during October and early November 1961, and spoke to the em-

ployees in the unit about the election. Mickel visited about 15 sites and made between 25 and 30 speeches. He made no talks after November 6, 1961.[2]

Mickel testified that he had no written speech but attempted to give the same talk at each site. Asked on direct examination what he said, he stated that he asked the men for their support. He told the men that it had always been the Daniel policy to hire at the gate through the foremen and that such policy would always be maintained whether the Company won or lost the election. He attributed the Company's success in securing work in part to the competence of the men in the mechanical field. He emphasized that the men would never have to pay "tribute" to anyone to get a job, and that they would continue to get their jobs at the gate. He said he referred to a r u m o r that the Company would subcontract work if it lost the election and told the employees that it was not true, but, on the contrary, the Company would work harder to sell its services.

Mickel told the men that he could not threaten them or promise anything, and that he would not do so anyway, but asked them to support the Company. He said he told them that no one would know how an individual voted and it was a matter for their own conscience. Regardless of the outcome of the election, the Company would keep on trying to get work, he said. He testified that he informed the employees that the Company felt the Order of the Board directing the election was wrong and that the Company would appeal ". . . win, lose or draw." He told the employees that an appeal would take as long as 10 years.

Mickel, according to him, told the employees about the amount of work the Company had and how it was negotiated as a package proposal. He told them that, in his opinion, the Company was able to sell the package proposal better to customers, ". . . if we did not have a union, because we would not have jurisdictional disputes, we would not have

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[2]Contrary to a union objection, I credit Mickel and Johnson with respect to the date, and find that no speeches were made after November 6, 1961.

interruptions, and things of that sort, which could come from having a union."

Mickel denied various statements attributed to him by employee witnesses. He denied that he said that there never would be a union contract or that the Company would never be organized. He said he never said the Company did not have to hire men sent through the business agent of the Union but rather that he said the Company hired at the gate through the foremen. He stated that he mentioned the right-to-work laws and that ". . . tied into the fact that you never had to pay any tribute for working for Daniel Construction Company. (but) we would hire at the gate and through our foremen, as we had always done, regardless if the union won the election . .. ." Mickel denied that he said, as testified to by Medlock, if the job went union the Company would lose contracts and quite a few people, the pipefitters in particular, would be looking for work.

Theodore Johnson, manager of the mechanical department of the Greenville division, accompanied Mickel on his tour of the projects and thought he was present at each of Mickel's talks. Mickel, however, was not present at all of Johnson's speeches. Johnson testified that he did not make the same speech on each occasion but tried to cover the topics that Mickel and he had decided to cover. He said Mickel always made his speech first, and, if Mickel had not covered a point adequately, Johnson would cover it.

Johnson, when asked for as complete a version of his speech as he could recall, testifed that, although ". . . this is not exactly the same as talking to fifty pipefitters . . ." he would give as close a version as he could. He said he greeted the men after Mickel finished and referred to the coming election. He mentioned rumors about subcontracting work and denied their authenticity. Johnson told the men that he knew many of them had union cards but that was their business. He said, however, that the Company wanted to keep on as an "open shop" and asked the men for their votes. He also stated, however, that the ballot was secret.

According to Johnson, he spent some time on the Com-

pany's practice of hiring at the gate through the foreman and stated that such practice would continue. He referred to State right-to-work laws and the Taft-Hartley Act, he said, and told the men the law prevented discrimination against either union or nonunion men.

Johnson stated that he told the employees that some of the Company's clients preferred open shop contractors, and that, in his opinion, someone else would get some of that work if the Company lost the election and became organized. He added that he told the men at that point, however, that if other companies got the work they would still need pipefitters to do it, and that pipefitters in the geographical area would be hired to do it.

Johnson repeated that he asked the men to vote for the Company because it would help the Company get work but that it would not make jobs for pipefitters and it " . . . wouldn't lost jobs for them."

Johnson denied that he said that Daniel Construction would not negotiate if the Union won, or that Mickel said the Company would not sign a contract. He stated that both he and Mickel did say that the election was improper and the Company intended to resist it by all legal means and that it could "drag out eight to ten years."

As is usual in these cases, particularly after such a long lapse of time, credibility is a serious problem. I do not credit the testimony of all witnesses for the General Counsel, or the Union, in their accounts of what Mickel and Johnson said, but, on the other hand, although I find that Mickel and Johnson spoke to the men substantially as they testified, they were not completely candid, particularly in the stress and emphasis they gave topics, or in their recall of their phrasings.

First, as far as the employee witnesses are concerned, I do not believe the testimony of Harold Free, Charles Bugg and Wallace Poe, that Mickel stated that the Company would never negotiate a contract with the Union. Not only did these witnesses appear uncertain in their testimony, but the remark itself is not in character with the rest of Mickel's

speech. Mickel emphasized the Company's hiring practices and his intention to keep them that way. He also stressed the Company's belief that the election was improper and his intention to litigate it. Although this might reasonably have led the listener to conclude that a contract with the Union was unlikely in the near future, it would be clumsy for Mickel to make the remark attributed to him. I find that Respondent did not tell its employees that it would never nogotiate a contract with the Union, as alleged in paragraph 13 of the complaint.

It is clear to me, however, that no matter how Mickel and Johnson attempted in their testimony to phrase their recall of that phase of their talks which related to customer reaction to Daniel Construction going union, they, in their speeches, attempted to instill in the minds of employees the belief that Respondent would lose contracts and there would be less work available if the Union won. I base this belief on my observation of the witnesses when they testified on this subject as well as a synthesis of the testimony of the General Counsel's witnesses and Respondent's. In the first place, there is no essential difference between the witnesses for both sides on this point. Mickel sparred with counsel about whether he said it would be "easier" to sell the Company's package deal without a union or "more difficult" with it, but the idea is the same—employees would run the risk of losing work if they voted for the Union. In addition, I do not believe Johnson where he testified that he added to his statement about others getting the work if Respondent were organized, his opinion that the employees would get work with the other contractors. One of the principal thrusts of Respondent's appeal to employees was its asserted ability to get contracts because it operated open shop. I do not believe it likely that Respondent diluted this appeal by telling the employees that if Respondent lost contracts the employees would not suffer because they would be employed elsewhere. I find, therefore, as testified to by Eugene Brock, James McGowen, Paul Bailey, James Medlock and Jack Drake, that Respondent told its employees that it would

lose contracts and there would be less work for employees if they voted for the Union in the election.

The complaint also alleged that Mickel and Johnson promised employees employment on future jobs if they voted for Respondent in the election. James McCowen and Paul Bailey, whose testimony I credit, stated in substance, as set forth in greater detail above, that Mickel and Johnson described Daniel Construction hiring practices and said the men would have jobs when the project they were working on was completed if they contacted their supervisors. This practice would be jeopardy, however, according to the witnesses, if the Company did not remain nonunion. I find that Respondent made statements to the employees as testified to by McCowen and Bailey, and that, in the context, the remarks were promises of benefits.[3]

B. Foremen advise employees that Respondent has instructed them to report on union sympathies of employees

Bayless Long, a foreman at the St. Gobain project at the time of the election, credibly testified that he was instructed by Mechanical Superintendent McAllister to talk with the employees and find out how they were going to vote and report the results to McAllister. Long, a member of the Union at the time, told McAllister that he would not conduct the poll. Long then called his crew together, told them what the superintendent had asked him to do and his refusal. He testified that he never tried to influence his men against the Union.

Jack Eades, a foreman at the St. Gobain job, was asked by General Superintendent Lanning to find out how the men under him felt about the coming election and report. Eades, who carried a union card was reluctant. The next morning he called his crew together and told them that they

[3] I also credit the testimony of Leonard Bailey that Mickel said the men could look forward to working for Daniel in the future and secure employment at the jobsite, and Paul Bailey's testimony that Barrington King said if employees wanted work they could be recommended by their superintendent for employment at another job.

would have to make up their own minds about the election, and that if he had said anything in the past to influence them, he was now retracting it. Shortly thereafter he contacted the men individually and told them what Lanning had asked him to do and that he had refused.

The above testimony is uncontradicted, and I find, in accord with the allegation of paragraph 7 of the complaint, that Respondent's supervisors, in October 1961, told employees that Respondent had instructed them to report the union sympathies and desires of Respondent's employees.

Employee Dewey Maine also testified that his foreman on the St. Gobain job, Homer Lane, told him that he had orders to find out how his men were going to vote and report it to Superintendent McAllister. Lane had died at the time of the hearing but I have examined the evidence carefully in the light of the testimony of other witnesses who worked on the same job and find that Maine was told by Lane that he had such instructions.

C. Interrogation of employees about the Union

Employee Fred Mottern testified that Foreman Long told him he was asked by the superintendent to find out how the employees felt. Later, Mottern was asked by Superintendent McAllister how the election was going. The employee told him things were very quiet. About a week later, the superintendent returned and again asked the employee how things were going and how he felt about the election.

Nathan Harrison testified that Superintendent Grigsby interrogated him about the Union a week or two before the election at the C.V.N.P.A. Project. According to the employee, Grigsby told him he had reports he was talking "strong union" and wanted to know if it were true. The employee denied it and Grigsby said, "Look me straight in the eye and tell me you are not talking union on this job."

Jess Humphreys, employed at the St. Gobain job at the time of the election, testified that Foreman Jack Denny talked to him about the election in October 1961. He said Denny told him he wanted to talk with him and asked him how he felt. Humphreys, a strong unionman, gave his reasons

for his feelings, and Denny argued with him. Denny told him that Daniel had given them regular work but the Union had not. He also told the employee that if the Union won, Daniel would take the matter to court and keep it there for 10 years and work nonunion during that period.

Mitchell Daniels testified that Foreman Gilbert talked with him at the National Aniline project at the time of the election and asked him how he was going to vote. He also said Beamon Mills, general foreman, questioned and threatened him.

Harold Free testified that Foreman Beasley asked him how he felt about the Union and made a threatening remark.

I do not credit the testimony of Daniels or Free but I do credit that of Mottern, Harrison and Humphreys. I have previously refused to credit Free in his testimony about the Company not signing a contract with the Union, and for the same reasons I cannot accept his testimony here. He was vague about dates, and the statement he gave the Board contains nothing about the Beasley interrogation or threat which Beasley credibly denied. Based upon my observation of Daniels, I think his memory of past events was not completely reliable. In addition, the testimony itself is somewhat uncertain about the time and the number of conversations he had with Gilbert and Mills. Gilbert and Mills testified and credibly denied the statements attributed to them by Daniels. Mills said the only conversation he remembered with Daniels was when Daniels volunteered that he carried a union book and intended to keep it. Mills said he told Daniels that it was the employees' own business and did not ask Daniels how he was going to vote. Finally, Daniels testified that he told employee Goodman about his alleged conversations with Gilbert. Goodman, called as Respondent's witness, testified that Daniels had never told him that either Mills or Gilbert had threatened him or asked him how he was going to vote. He said he heard Daniels tell Mills that he carried a union book and Mills reply that it was Daniels' own business. I have no reason to discredit this witness.

Mottern's testimony, on the other hand, about McAllis-

ter's questioning is undenied. Foreman John Denny, employed at the American St. Gobain job during the election, denied that he questioned Humphreys about his views at all. He explained that he and Humphreys had been friends for years and members of the same local union. He said he discussed the outcome of the election with Humphreys merely in general terms, but could not recall particular conversations. He stated that Humphreys was a strong unionman and would try to sell Denny on the Union's cause but Denny did not see it his way. He added that if he were going to try to influence anyone on the job it surely would not have been Humphreys for he was president of the union local at one time. Although there is no question about Humphreys' well-known position about the Union or Denny's relationship with him, I believe and find that Denny did interrogate the employee in order to find out what the sentiment on the job was at the time of the election. Other supervisors at this job had been asked to find out what the employees were thinking, and it is likely that Denny was also instructed to do the same. His friend Humphreys would have been an excellent source of information. Finally, Humphreys was the more believable of the two. He testified in a straightforward and restrained fashion. Denny was evasive and wary.

Mechanical Superintendent Grigsby denied that he interrogated employee Nathan Harrison about the Union. He stated that Harrison was a sort of "protege" of his and admitted that he had stayed at the same trailer camps, hunted, fished and socialized with Harrison. He denied, however, that he had any positive evidence that Harrison was a member of the Union or that he ever discussed the Union, or union activities, with Harrison at all. In my opinion, Grigsby's account of his aloofness regarding union with Harrison, despite their close relationship, is unbelievable. As indicated earlier, I credit Harrison.

Although there is no allegation in the complaint about interrogation by Foreman Jasper Drum, employee James Medlock testified that Drum asked him how he would vote

in the election. Drum denied the questioning and the matter was thoroughly litigated. As will appear in more detail in section III E, *infra*, I find that Drum was not a credible witness, and I accept Medlock's version.

I find that Respondent interrogated employee Medlock in October 1961, and, as alleged in the complaint, other employees in October and November 1961, concerning their union activities and desires.

D. The poll of employees

Archie Stringer, foreman at the Bowater job during the election, and a member of the Union at the time, testified as a witness for the General Counsel. He said there were about 20 men in his crew and, sometime before the election, he passed out slips of paper and asked them to indicate their preference "for or against [illegible] meaning the Union. The ballot was secret and all employees viewed the count. Stringer testified that he took this poll for his own "satisfaction." He was not instructed by the Company to take the poll and he did not report the result to higher supervision.

I find that Stringer did take the poll as alleged in the complaint but, as explained later in my analysis and conclusions with respect to the alleged unfair labor practices, that Respondent was not responsible for his action.

E. Alleged threats and promises by supervisors

The complaint alleged in paragraph 9 that Respondent, by Foreman Denny, threatened its employees that it would be difficult for them to get another job if they voted against Respondent in the election. Jesse Humphreys, whose testimony I have credited above, testified that Denny, after asking him how he felt about the election, told him that if the Union won the election it would be hard to get a job with Daniel. According to Humphreys, Denny, in the same conversation, told him that the Company had a lot of new work coming along and the employees could continue to work by going from one job to another as they were completed. Denny denied the conversation or statements, but I credit Humphreys and find that Denny did make the alleged remarks.

It was alleged in paragraph 10 of the complaint that Foreman Mills made an illegal promise of future employment. Mitchell Daniels, whose testimony I have previously discredited, testified on the subject and said that Mills told him he would be taken care of with work if he voted against the Union. Mills denied the remark, and I credit Mills.

I also find that there is no evidence of any probative value in the record to support the allegation in paragraph 10 of the complaint that Mechanical Superintendent Tommy Taylor promised employees jobs.

Paragraph 11 of the complaint alleged that certain supervisors threatened employees with loss of their jobs if they did not vote for Respondent in the election. I find that Foreman Gilbert and Mills did not make the threats alleged and testified to by Mitchell Daniels for the same reasons which have previously caused me to discredit his testimony.

Employee Fred Mottern's testimony about Mechanical Superintendent McAllister's stating that ". . . if we did vote we'd know what it would mean . . ." is too ambiguous to support a finding that McAllister threatened employees with loss of jobs if they did not vote for Respondent, as alleged in paragraph 11 of the complaint.

Harold McLaughlin was working for another employer at the time of the election but had worked for Daniel Construction previously and was eligible to vote under the Board's decision. He received a mail ballot and then telephoned Foreman Murray, of the Irmo project, at Murray's home. It appears that he and Murray had worked together in the past and were good friends. The witness testified that the conversation was friendly, and, after talking for awhile about automobiles, McLaughlin asked Murray how he was going to vote. According to the employee, Murray said if he had a man working for him that voted against ". . . Charlie Daniels for the union . . . ," "I'd run their ass off." Murray testified that he and McLaughlin were friendly and that he had attended union meetings with him. He recalled that McLaughlin telephoned him and asked him about the election. Murray told the employee, he said, that he knew what

he was going to do and changed the subject. He denied the statement about running employees off the job. I credit Murray and find the remark attributed to him was not made. Murray appeared to be telling an honest story with some certainty, but McLaughlin was unsure and somewhat hostile and evasive. Even if the remark were made obvious questions about its legal effect arise in view of the close relationship of the parties and McLaughlin's raising of the issue.

Paragraph 11 also alleged that Foreman Ray Baker threatened employees with loss of employment if they did not vote properly in the election, and employee Wallace Poe testified about the allegation. He testified that he was employed at the Pittsburgh Plate Glass project in Shelby, North Carolina, at the time of the election in Baker's crew, and that 2 days before the election, while eating lunch in the company shack, Baker said, "Boys, you know we got an election coming, you know Pittsburgh won't put up with the union, if it goes union you boys will be out hunting a job." The next day Baker, at the same location and to the same group, stated, according to Poe, "Well, boys, you know tomorrow is the election; Pittsburgh won't put up with the union, if the union wins it you boys will be out hunting a job." Poe admitted under cross-examination that Baker said the men should vote whichever way they wanted and to make up their own minds.

Ray Baker denied that he had made the statement about Pittsburgh Plate Glass but said that he had heard employee Lyles make a statement to that effect. Baker, a union member, testified that he kept out of the discussions in the shack about the election. Lyles testified that he had not heard Baker, who is also his foreman, express an opinion either way about the Union or state a preference. Lyles said that he (Lyles) had made some remark about Pittsburgh Plate Glass not liking unions. Baker and Lyles impressed me as truthful. I discredit Poe, and find that Baker did not make the statements alleged.

The complaint, in paragraph 16, also alleged that Su-

pervisor J. P. Drum warned employees that they would never work for Respondent again if they served as union observers at the election. James Medlock testified that his foreman, Jasper Drum, had a conversation with him in the latter part of October 1961. Drum asked Medlock to talk to employee Harrison and warn him that he would be run off the job by Superintendent Grigsby if he did not stop soliciting for the Union.

Medlock also testified that, a few weeks after the above conversation, Drum again came to him and told him that Grigsby had said that Medlock had been talking too much on the job. Medlock saw Grigsby and asked him what he meant and Grigsby answered that he ". . . thought union men should go to the union job, and that a non-union man should stay on a non-union job . . . ."

According to Medlock, he was told by Drum a few days before the election that if he acted as an observer for the Union at the election he would never work for the Company again.

Foreman Drum testified that he was a member of the Union at the time of the election and had been for about 20 years. He has worked on all-union jobs and secured a job with Daniel in Pensacola, Florida, at one time, through the Union. At the time of the hearing, however, Drum had charges pending against him in the Union and a fine of $5,000 imposed upon him. He said that Medlock worked for him, but Harrison did not, and that he recalled that on one occasion Harrison walked by and Drum said to Medlock that ". . . if that boy don't go to work and do a lot less visiting why he's gonna get run off." He said this was merely speaking as one union brother to another and had nothing to do with union activities but only Harrison's unauthorized absences from his job.

Drum said that he knew Medlock was a union member and Medlock knew he was too because the subject had been mentioned when he hired Medlock. With respect to the alleged threat about the result of being an observer, he explained that Medlock came to him for advice and talked

with him in private "as a brother . . . ." Medlock told Drum, so Drum testified, that he had been asked to act as an observer, and asked Drum what he thought of the idea. Drum told the employee that he could not tell him what to do but that he thought that the Columbia, South Carolina, local of the Union should furnish an observer since the jobsite was in that local's jurisdiction and one of its representatives would be more familiar with the men on the job. Medlock did serve as an observer, however, and later, when he left the job for work at another employer, Drum carried him on payroll for some time and later he was reemployed by the Company.

Drum denied that he had been told by Grigsby to warn Medlock about his union activities but said that Grigsby told him he had seen Medlock away from his work and to speak to him. He did so and told Medlock that he was doing too much visiting.

Drum also denied that he solicited votes for the Company at a safety meeting of his employees a short while before the election, as testified to by Medlock.

Mechanical Superintendent Grigsby, who I have found earlier interrogated Harrison about the Union, testified that he saw Medlock away from his work and told Drum about it but made no mention of the Union at the time. According to him, Medlock came to him the next morning and wanted to know if it was "because he was talking Union . . ." that Drum had spoken to him. Grigsby said he told Medlock that what he was talking about was none of his business but his only concern was that the employee was not at his worksite. He denied the remark about a unionman being on a union job, as testified by Medlock.

Although Medlock's recall of certain detail was not of the best, I credit him over Drum and Grigsby despite Grigsby's corroboration of Drum in part. Earlier I have found that Grigsby's account of his lack of knowledge of Harrison's activities was unbelievable, and his testimony about Medlock also seemed contrived. As far as Drum is concerned, his account of Medlock's visit to him to ask his advice about be-

ing an observer was implausible. Men on the job came from all sections of the southeast and Medlock's ability to observe would be as competent as the average journeyman. In addition, although Drum denied soliciting for the Company at the safety meeting, as testified to by Medlock, he did admit that employee Small stated at the meeting that he had heard all the soliciting that he wanted to hear. Small testified credibly that Drum was doing the soliciting. Finally, Harrison, whose testimony I have credited earlier, corroborated Medlock with respect to Grigsby's concern about Harrison's union activities, as described in more detail below. These factors, in addition to my recall of the demeanor of Medlock and Harrison, lead me to believe them.

I find, therefore, that Supervisor Drum told Medlock that he would not work for Respondent again if he acted as a union observer at the election, as alleged in paragraph 16 of the complaint.

I also find that Grigsby told Medlock that unionmen should work on union jobs and nonunionmen on nonunion jobs, implying discrimination against him if he continued his union activities.

Nathan Harrison credibly testified that, about August 1, 1961, the day before he went to work at the C.V.N.P.A. project in Parr, South Carolina, Grigsby talked to him about his union activities. Grigsby warned Harrison that he had been fired at another job because of his union activities and that if he intended to work for Respondent he would have to discontinue them. Sometime in October 1961, Grigsby asked Harrison to come to his office and there accused him of soliciting union travel cards for the Columbia, South Carolina, local of the Union, which the employee denied. General Foreman Hall, who had been sent for by Grigsby earlier, arrived about that time and said to Harrison, "if you've got to talk, talk Daniel, Daniel pays your grocery bills and all the rest of your bills; that's (the) way I do. If you think anything of your job that's what you'd better do." Grigsby denied he had ever discussed union activities with Harrison, and Hall denied being in Grigsby's office while Grigsby

reprimanded Harrison, or making any statements to Harrison about the Union in Grigby's presence. He specifically denied asking Harrison to talk in favor of the Company and not the Union. He testified that he had reprimanded Harrison many times for being away from his work over a period of 8 to 10 months, and that it was almost an everyday occurrence for Harrison to be away from his work. He added that Harrison was an habitual loafer and that he had observed this quality in Harrison when they both worked on another job. Hall wanted the Company to win the election, he said, but had very little interest in the matter. I do not credit Hall's testimony. In my opinion his account of Harrison's alleged absences from his job is exaggerated and a cover for Hall's denial of his and Grigsby's reprimand for Harrison's activities on behalf of the Union. I find that Grigsby and Hall threatened Harrison with loss of employment if he continued his activities for the Union.

There is no allegation in the complaint concerning the activities of Foreman Dale Blevins, but employee H. F. Elledge testified that sometime before the election an apprentice asked another employee how he could secure a union book, and that Blevins, who was working nearby, said that if the apprentice cared anything about his job he had better forget about the union book. Blevins denied the statement. He said he was a union member at the time and that if an apprentice had asked him where he could obtain a book, he would have recommended the union hall. I believe Blevins based on his demeanor compared to Elledge's and the ring of sincerity in his story. Elledge, on the other hand, had a poor memory and also stated that he had never mentioned the incident to anyone until about 2 weeks before he testified.

There is also an allegation in paragraph 15 of the complaint that Respondent threatened to subcontract its work if the Union won the election. There is no evidence to support this allegation in the record.

F. Analysis and conclusions regarding the unfair practices

Laying aside for the moment the speeches made by company officials to the employees in the unit, I have found that foremen told employees that the Company had instructed them to investigate and report on the union sympathies of their men; that supervisors interrogated employees about the Union; that employees Medlock, Humphreys and Harrison were threatened with loss of employment after being interrogated, and that one foreman conducted polls of his crew.

Respondent argues that even if these acts occurred, they were isolated and, in the light of the relationship of foreman to journeyman in this industry, realistically innocent. I have given full consideration to Respondent's arguments and tried not to lose sight of the fact that many of the supervisors involved were union members, had worked elsewhere with the employees, or were friendly with them, but I find, that, in the circumstances, the supervisors were expressing Respondent's views and position, and employees reasonably believed they spoke for Respondent and not as "union brother."

Two acts of interrogation took place on the American St. Gobain job, a relatively large employment site. Superintendent McAllister and Foreman Denny interrogated employees, and this is the same job upon which employees were told by three foremen that higher company representatives had instructed them to report on the views of the men. These factors indicate that the inquires were not casual, and the size of the job prevents the acts from being labeled "isolated." In addition, employee Free testified without contradiction that he was interrogated by Personnel Manager Barrington King on the National Aniline project, and Harrison and Medlock were interrogated by Superintendent Grigsby and Foreman Drum, respectively, at the C.V.N.P.A. job. Finally, when it is recalled that Denny, at the American St. Gobain job, and Drum and Grigsby, at C.V.N.P.A., coupled their inquiries with statements indicating displea-

sure with and possible reprisal because of union activity, the impropriety of the interrogation is apparent. I find, that by interrogating employees as alleged, Respondent violated Section 8(a)(1) of the Act.

I also find that when foremen told employees that they had been asked by their supervisors to report the employees' union views but had refused, the employees were, nevertheless, coerced, and Respondent was legally responsible for it having set the chain of events in motion by its instructions to the foremen, even though the foremen involved may have been friendly with, or sympathetic toward, the men. By such action Respondent violated Section 8(a)(1) of the Act.

I find also, despite the fact that the speaker may have been a union member, Respondent violated Section 8(a)(1) of the Act by Drum's threats of loss of employment to Medlock, Grigsby's and Hall's to Harrison, and Denny's to Humphreys, as set forth in my findings of fact.

On the other hand, I find that Foreman Stringer's secret poll of employees was not legally improper in the circumstances. It seems that all the employees partcipated in it and even helped to count the ballots. Stringer, a union member, testified that he did it for his own "satisfaction" and I believe him for he did not appear at all hostile. He was not instructed to take the poll and did not report the results to higher officials. No other acts of interference are asserted to have been connected with the poll. I find that Respondent did not violate Section 8(a)(1) of the Act by the poll as alleged.

I also find that Mickel and Johnson's speeches to employees prior to the election, considered as a whole, but without reference to any other unfair labor practices, were coercive. Respondent's appeal for employee votes rested on four principal points, as follows: First, loss of employment if the Company were organized; second, continued future employment through hiring at the gate through the employees' supervisors; third, a firm intention to maintain the existing hiring practices regardless of the results of the election; fourth, interminable delay caused by litigation of the issues

raised by the Direction of Election. Although any one of these taken alone might be considered to be the expression of views, argument, or opinion, protected by Section 8 (c) of the Act, they, in my opinion, as a cohesive combination presented to the voters, tended to restrain employees in the exercise of their right to vote freely by instilling in them a foreboding of damage through loss of employment if the Union were selected, as contrasted with maintenance of present employment and securing of future jobs through familiar, and friendly foremen if the Union were rejected, all coupled with consistent stress on the futility of the election because of Respondent's intention to keep its present hiring practices regardless of the outcome, and to litigate the issues for a decade, in any event. Respondent's campaign, as I see it, cannot be viewed as merely a restrained expression of its legal position, or a prediction of the economic consequences of unionism imparted to employees in a noncoercive manner. I find in Respondent's speeches a threat to the economic security of the employees for which Respondent must take the responsibility even though the loss of employment was attributed to adverse customer reaction, and implied promises of favorable treatment on future jobs, if the employees rejected the Union in the election. By such conduct Respondent violated Section 8 (a) (1) of the Act.

G. Findings and conclusions with respect to the objections to the election

All of the matters alleged in the complaint as unfair labor practices are also the subject of objections to the election. I have found that Respondent's supervisors interrogated employees about their union views; told employees that they had been instructed to report on their union leanings; and threatened employees with loss of employment. In addition, higher officials, such as Buck Mickel and Ted Johnson, in their speeches threatened employees with loss of employment if the Union were selected in the election, and promised job security if the Union were defeated. The Board has held that conduct violative of Section 8 (a) (1) of the

Act is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election.[4] I shall, therefore, recommend that the election be set aside on that basis alone. I also conclude that Respondent's four-pronged campaign, as set forth above, in which it stressed loss of security, present and future full employment, its inflexiblity with respect to present employment policies, and inevitable delay, created an atmosphere incompatible with the exercise of a free choice in the election, regardless of whether the statements made in the campaign are protected under Section 8 (c) of the Act.[5]

H. Other objections to the election

In addition to the matters which were alleged as unfair labor practices, the Union had two other substantial objections upon which the Board ordered a hearing, namely, the alleged disenfranchisement of voters at the Statesboro job, and voting by foremen in the election.

1. *The Statesboro job and the Herndon and Smith subcontract*

Daniel Construction Company was the general contractor for a large job at Statesboro, Georgia, at the time of the Board election, and had subcontracted the mechanical work to Herndon and Smith, Inc. No election booth was established for the pipefitters at the Statesboro project and the Daniel Construction Company justifies it on the ground that the pipefitters, of which there were about 60, were the employees of the subcontractor. The Union's position is that Daniel and Herndon and Smith were a single employer within the meaning of Board decisions, and that the employees were eligible to vote. It claims that the Company, in bad faith, intentionally deprived the Statesboro pipefitters of the right to vote.

The Company signed a contract to build a plant at

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[4] *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782; *Haynes Stellite Co.*, 136 NLRB 95.

[5] *Lord Baltimore Press*, 142 NLRB No. 40; *Ideal Baking Company of Tennessee, Inc.*, 143 NLRB No. 14; *The Trane Company*, 137 NLRB 1506.

Statesboro on May 13, 1961, and, on the same day, signed a contract with Herndon and Smith to furnish labor and supervision and complete the entire mechanical job. The approximate value of this labor contract was $85,000, and Herndon and Smith was to receive its payroll cost plus insurance, social security, taxes and the like, in addition to a fee of $10,000.

Some 40 years ago, Mr. Smith and Fred Herndon, of Elberton, Georgia, formed a partnership and engaged in many businesses, including construction as general contractors. Smith died and Herndon became the sole owner. By the late forties, Herndon was concentrating on the building supply business. In the late fifties and in 1960, Herndon became somewhat active in construction operations to supplement the building supply operations in which profits were rapidly diminishing. In 1959 or 1960, the building supply end became a financial drain, and Mrs. Minor Herndon Mickel, Fred Herndon's daughter and wife of Buck Mickel, executive vice president of Daniel Constructon, invested money in Herndon and Smith. Herndon and Smith's problems got worse, however, and it was dissolved as a partnership and creditors were paid off.

Herndon and Smith gave up its building supply business and incorporated, in June 1961, to engage in construction, a phase of its business which had been profitable from 1959 to 1961. The incorporators were Peyton Hawes, an attorney, Fred Herndon and Mrs. Mickel. Mrs. Mickel owned all the stock in the new company. Buck Mickel does not have any financial interest in Herndon and Smith and has never been a stockholder or served on its board of directors. Mrs. Minor Herndon Mickel has never had any interests in Daniel Construction, has never held an office or been employed by Daniel or owned any stock in it. This is also true of Fred Herndon.

Buck Mickel testified that he saw an opportunity of helping Herndon and Smith and negotiated a labor contract with it at arms length. Herndon and Smith was to perform on its own, hire and fire on its own, and satisfy Daniel Construction Company, he said. Mickel asked Ted Johnson,

manager of the mechanical engineering department of Daniel Construction, to supply Herndon and Smith with a good man, and Lloyd Pressley, a Daniel employee at the time, was supplied to Herndon and Smith as superintendent.

Pressley had been employed by Daniel since 1949, and, in the last few years, had been working as a general foreman or mechanical superintendent. Prior to going to Statesboro, Pressley worked at another Daniel job, and for the first few weeks that Pressley was superintendent at Statesboro, he traveled back and forth between the other Daniel job and Statesboro supervising both. During that period he received checks from Herndon and Smith and Daniel for the work done for each. When the Statesboro job was phasing out, Pressley was transferred by Thompson, a Daniel mechanical engineer, to a Daniel job in Louisville, Georgia, and for a period of weeks Pressley worked at both jobs.

Pressley had not heard of Herndon and Smith before he went to Statesboro, and he met Mr. Herndon only once on the job. He never met another Herndon and Smith employee.

About a third of the men employed by Pressley on the Statesboro job followed him from the previous Daniel job, and about the same number went with him to Louisvlle. It appears that the pay rates for pipefitters at Statesboro were established by Daniel for when Pressley arrived at the job he found the rates already posted. Pressley testified that the job was operated like all other Daniel jobs on which he had been mechanical superintendent, and he used Daniel forms and procedure. All equipment and tools on the job belonged to Daniel, and Daniel ordered and shipped all material to the site in its name.

Applicants for employment were hired by Pressley and they were given Daniel application forms and employment cards. Employees were paid with a Herndon and Smith check, except on layoff, when they were paid with a Daniel check for Herndon and Smith had no petty cash fund on the job.

The Daniel timekeeper prepared the payroll for Hern-

don and Smith employees, after the foremen turned in the time, and sent it to the Greenville office of Daniel, together with the Daniel payroll. Daniel processed the Herndon and Smith payrolls, prepared the checks, and after securing Mrs. Mickel and Fred Herndon's signatures, sent them and the checks for Daniel employees back to the jobsite.

Herndon and Smith were reimbursed by Daniel for all expenses in connection with the job. Each month it submitted a voucher to Daniel for all its costs, including the payroll, payroll taxes, insurance, workmen's compensation and like matters.

All forms filled out by Pressley, such as labor distribution reports and application forms, were turned over to the Daniel timekeeper. There is evidence that all these went to the Daniel Greenville office and were mixed with Daniel reports.

The labor contract provided that Herndon and Smith were to perform the entire mechanical job, including sprinkler work. This was not done, however. Pressley testified that he called Daniel for sprinkler fitters.

Buck Mickel testified that Daniel has similar labor contracts with other employers and that Daniel itself sometimes performs purely labor contracts where everything else is supplied by the contractor.

Daniel continues to contract with Herndon and Smith but the contracts are performed like that in the instant case. Mr. Herndon's only office is in his home and, so far as the record shows, he has no office employees.

I have set forth the facts with respect to this issue in some detail because the Board ordered a hearing on it and may wish to consider it in deciding eligibility to vote if a new election is held, and because the parties spent so much time on it at the hearing and in their briefs. Although I lean strongly towards the Union's view that Daniel Construction, in all reality, was the employer of the men hired by Pressley at the Statesboro job,[6] I find it unnecessary to decide the question since it is clear to me that, whatever motivated

[6] *Roane-Anderson Co.*, 95 NLRB 1501, 1503.

Daniel in making such a contract with Herndon and Smith, the pendency of the Board election had nothing to do with it. Daniel Construction did not intentionally and deliberately disenfranchise these employees in order to interfere with the election, as contended by the Union. In addition, even if every one of the approximately 80 pipefitters at the Statesboro project had voted it would not have affected the results of the election, and there is no evidence that the failure to list the employees as being eligible had any restraining effect on other employees.[7]

2. Participation by foremen in the balloting

In its Direction of Election the Board, because of the intermittent nature of employment in the industry, determined that employees who had worked 30 days for Daniel in the year prior to the eligibility date, or who had some employment in that year and had worked for 45 days in the 2 years preceding, were eligible to vote. The Board, however, after describing the unit, excluded ". . . foremen (working and nonworking, general foremen . . ." The Company took the position that those foremen who had worked 30 or 60 days as journeymen during the 2 years immediately preceding the election were eligible to vote, even though they were foremen at the date of the direction of the election. Representatives of the Regional Director of the Board were aware that the Company was planning to include such men on its eligibility list.

Foremen were included on the Company's proposed eligibility list but their names were stricken by an agent of the Board and identified with a symbol meaning foreman. The Company's attorney advised the Board that the Company still intended to advise the foremen that it considered them eligible to vote if they otherwise had the qualifications. The Company did so instruct its supervisors and, as a result, a substantial number of foremen at all jobsites cast ballots

[7] It is not clear how many of the employees were deprived of the right to vote, even if they had it, for employee Mixon testified that the Statesboro employees voted absentee ballots.

which were challenged. It is also a fact that a few foremen who had not been journeymen in the 2 years preceding the election voted as did two mechanical superintendents. The great bulk of the foremen had worked as journeymen, however, as is usual in the industry, but most had spent the greater part of their time as supervisors.

Buck Mickel testified, and I credit his testimony, that because of ambiguities in the Board's Direction of Election regarding the 30-45 day rule, he believed that the foremen should have an opportunity to vote if they otherwise qualified under the rule. He told the superintendents to advise the foremen to vote if they wished, to vote last if possible, to be as inconspicious as possible and not vote in their identifying white hats. The foremen followed these instructions as far as the record discloses.

I find that the Company acted in good faith in instructing its supervisors as it did, in the circumstances of this case. In addition, the precautions taken by the Company to minimize whatever impact the presence of the foremen may have had, taken with the admitted changes of status of the men in question from journeymen to foremen and back, leads me to conclude that their presence did not affect the results of the election.

IV. *The effect of the unfair labor practices upon commerce*

Respondent's activities found to be unfair labor practices in section III, above, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found, as set forth above, that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain

affirmative action, set forth below, designed to effectuate the policies of the Act. One of the more basic rights conferred upon employees by Section 7 of the Act, is the right to freely, and without coercion or restraint from an employer, express his choice in a Board-conducted election designed to determine the wishes of the employees with respect to a collective-bargaining representative. Since it has been found that Respondent interfered with this right, an order commensurate with the violation found, and designed to assure to Respondent's employees the opportunity to fully and freely exercise the rights guaranteed to them by Section 7 of the Act, is appropriate.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. Daniel Construction Company, Inc., Greenville, South Carolina, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By the conduct set forth in section III which has been found to constitute unfair labor practices, Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Secton 8(a)(1) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that:

Respondent Daniel Construction Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interrogating any of its employees with respect to their views or sympathies for the Union, or any other labor organization, or about their voting intentions in any Board election.

(b) Instructing its supervisors to inquire and report on the union views or sympathies of its employees.

(c) Threatening its employees with reprisals because of their union activities.

(d) By threat of reprisal or promise of benefit, inducing or encouraging any of its employees to vote for or against any labor organization in any election conducted by the National Labor Relations Board.

(e) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights to self-organization; to form, join or assist any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Post at its jobsites in its Greenville Division copies of the notice attached hereto and marked "Appendix."[8] Copies of said notice, to be furnished by the Regional Director for the Eleventh Region, shall, after being duly signed by a representative of Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for the Eleventh Re-

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[8]In the event these Recommendations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

gion, in writing, within 20 days from the date of receipt of this Intermediate Report and Recommended Order, what steps Respondent has taken to comply herewith.[9]

It is further recommended that the election held on November 16, 1961, in Case No. 11-RC-1453, be set aside, and that said case be remanded to the Regional Director for the Eleventh Region of the Board to conduct a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

Dated at Washington, D. C.

George J. Bott,
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

> WE WILL NOT interrogate our employees with respect to their views or sympathies for the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, or any other labor organization, or about their voting intentions in any LABOR BOARD election.
>
> WE WILL NOT instruct our supervisors to inquire of and report on the union views or sympathies of our employees.
>
> WE WILL NOT threaten employees with reprisals because of their union activities.
>
> WE WILL NOT by any threat of reprisal or promise of benefit, induce or encourage our employees to vote for or against any labor organiza-

[9] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Eleventh Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

tion in any election conducted by the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization; to form, join or assist any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activites for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

WE WILL NOT in any manner interfere with the right of our employees to make a free and untrammeled choice in any election ordered by the National Labor Relations Board.

All our employees are free to become, remain, or to refrain from becoming or remaining, members of any labor organizaton.

DANIEL CONSTRUCTION COMPANY, INC.
(Employer)

Dated ..... By .....
Representative (Title)

This notice must remain posted for 60 consecutive days from the date of posting hereof, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1831 Nissen Building, 310 West Fourth Street, Winston-Salem, North Carolina (Tel. No. 724-8356), if they have any question concerning this notice or compliance with its provisions.

APPENDIX E

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANIEL CONSTRUCTION COMPANY, INC.
Employer

Case No. 11-RC-1453

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under section 9 (c) of the National Labor Relations Act, a hearing was held before Jerry B. Stone, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer[1] is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. The Employer contends that no election should be held because: (1) its employees are scattered throughout the entire southeastern U.S., their work is highly seasonal in nature and they are hired on a temporary basis at the job site; and (2) the unit sought by the Petitioner is inappropriate.

Daniel Construction Company, Inc., is engaged in the construction of industrial and commercial plants in the southeastern U.S. It operates through 5 divisions, with four of these divisions subcontracting the plumbing and pipefitting work for

[1]Reference to "Employer" means the Greenville division of Daniel Construction Company.

their projects. The other division, at Greenville, South Carolina, performs all its own pipefitting and plumbing duties on projects under its jurisdiction, located in the states of Florida, Georgia, Alabama, Tennessee, North Carolina and South Carolina. Accordingly, it hires plumbers and pipefitters at the various job sites. There is no prior history of collective bargaining for these plumbers and pipefitters.

While the various projects of the Greenville division vary in size and duration, there is a nucleus of pipefitters and plumbers employed at all times. These are hired at the job sites and terminated at the completion of the project. The Project Manager and Superintendent are assigned by the Greenville office, and they in turn hire foremen and pipefitters and supervise their work on the job. Despite the considerable degree of autonomy exercised by supervisors at each project, the overall personnel policies are set forth by the Greenville office.

The working conditions, skills and nature of employment at all the construction locations throughout the six states area are very similar, even though the wage rates may vary from one project to another. Because of the nature of the construction industry, wherein projects are continually being started and completed, there is a minimum amount of interchange of employees in the sense of transfer of employees between permanent industrial establishments. However, preference is given to former Daniel pipefitters and plumbers in establishing the work force for new projects. It is common practice for foremen to take with them plumbers and pipefitters when they transfer from one project to another. These men act as a nucleus of the work force on each construction project.

At the time of the petition the Employer had 68 projects in operation, employing 600 or more plumbers and pipefitters. There is no indication that the Employer will not continue to employ a substantial force of plumbers and pipefitters in the future. The Petitioner seeks to represent the Employer's plumbers and pipefitters at the Employer's current and future projects.

Accordingly, we find that a question affecting commerce exists concerning the representation of certain employees of

the Employer within Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The Employer contends that if any unit of plumbers and pipefitters would be appropriate, it would only be a unit limited to a specific project.

While many of the Employer's projects may be under construction for 18 months or longer, a great number of these are of much shorter duration. To recognize the Employer's contention and direct an election only in a single-project unit would in many instances be a meaningless ritual and serve no useful purpose.

In view of the centralized control of labor relations[2], similarity of skills, functions, and working conditions at all projects,[3] along with the employee transfer between projects,[4] we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act: All journeymen plumbers and pipefitters, pipefitter welders, and pipefitter helpers employed by the Company in building and construction work in the states of North Carolina, South Carolina, Tennessee, Alabama, Georgia and Florida (Greenville Division), excluding all other building trades craftsmen, engineers, draftsmen, foremen (working and non-working), general foremen, clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

5. The Petitioner contends that all employees in the unit whose names appear on any payroll from January 1, 1960, to the date of the Direction of Election should be permitted to vote. During the hearing the Petitioner took the view that an employee on lay-off who had worked five days for the Company in the year preceding the election should be eligible to vote.

The Employer contends that only employees employed on a constant and continual basis for a period of six months im-

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[2] *McAlister's Dairy Farms, Inc.*, 118 NLRB 1117.
[3] *Cavendish Record Manufacturing Co.*, 124 NLRB 1161.
[4] *Trammell Construction Co., Inc.*, 128 NLRB 1365.

mediately prior to the direction of election should be allowed to vote.[5]

To adopt the Petitioner's contention as an eligibility formula would allow laid-off employees with no expectation of future employment to vote. Conversely, to adopt the Employer's contention would exclude a great number of employees with substantial periods of employment, albeit intermittent, and who were employed during the usual eligibility period. The record indicates that for various reasons, the Employer had experience early in 1961 a temporary restriction in the number of plumbers and pipefitters employed. Accordingly, many such employees with otherwise continuous employment records for six months or more may have been laid off for periods of no more than a few days. This in no way detracts from their continuing interest in working conditions which would warrant their participation in an election to determine a representative for collective bargaining concerning the tenure and conditions of their employment. Furthermore, Congress has indicated an awareness of the peculiarly intermitten nature of working conditions in the construction industry, in enacting Section 8 (f) of the Act wherein it has permitted the making of pre-hire contracts covering employees in that industry, and which requires membership in a union after a period of only seven days of employment rather than the period of thirty days applicable to employees in other industries.

Because of the nature of this industry, many employees experience intermittent employment, and may work for short periods of time on different projects. Furthermore, they may be employed by several different employers during the course of a year. As indicated by the record in the instant case, a plumber or pipefitter on a given job may not work every consecutive working day, but rather may experience short layoffs due to material shortages or because the pipefitting work is dependent on the work of various other crafts. In consideration of these facts, we find that all employees in the unit who have been employed by Daniel for at least 30 days in

[5]The Employer offered no evidence at the hearing to support this contention, and has refused to supply information on the matter requested by the Board.

the twelve month period preceding the eligibility date for the election hereinafter directed have a continuing interest in their working conditions which would warrant their participation in an election to determine a representative for collective bargaining with the Employer concerning the tenure and the conditions of their employment.

Furthermore, it may well be that there are pipefitters who have not worked 30 days for Daniel in the past twelve months, but because of their employment in preceding years and expectancy of future employment have a substantial continuing interest in the conditions of employment by the Employer. We believe it is reasonable to conclude therefore, that pipefitters employed by Daniel, who, although having failed to receive 30 days of employment in the year immediately preceding the eligibility date for the election, nevertheless have had some employment in that year and have worked at least 45 days in the past two years, have a sufficient continuing interest in their working conditions which would warrant their participating in a current election to determine a collective bargaining representative. Accordingly, we direct that in addition to those in the unit who were employed during the payroll period immediately preceding the date of the Decision and Direction of Election, all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 or more days within the period of 24 months, immediately preceding the eligibility date for the election hereinafter directed, shall be eligible to vote.

DIRECTION OF ELECTION

An election by secret ballot be conducted, in accordance with the direction in paragraph numbered 5, above, among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately

preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Those in the military services of the United States may vote if they appear in person at the polls. Also eligible to vote are the employees in the unit who meet the eligibility requirements set forth in paragraph numbered 5, above. Ineligibility to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes, by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.

Dated, Washington, D. C., September 21, 1961.

Frank W. McCulloch, *Chairman*

Boyd Leedom, Member

John H. Fanning, *Member*

Gerald A. Brown, *Member*

(SEAL)

NATIONAL LABOR RELATIONS BOARD

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 298

DANIEL CONSTRUCTION COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 20–39) is reported at 341 F. 2d 805. The Board's Decision and Order (Pet. 41–78) are reported at 145 NLRB 1397.

JURISDICTION

The judgment of the court of appeals enforcing the Board's order was entered on January 11, 1965 (Pet. 21). A petition for rehearing was denied on March 29, 1965 (Pet. 40). The petition for a writ of certiorari was filed on June 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company threatened its employees with loss of employment if they selected the Union as their collective bargaining representative and promised them continued employment if they rejected the Union.

2. Whether the court of appeals had jurisdiction to review a Board representation decision which did not form the basis of an unfair labor practice order before the court.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at pages 16–19 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 21, 1961, pursuant to a petition filed by the Union[1] under Section 9 of the Act, the Board directed an election among the pipefitters employed by the Company in the mechanical department of its Greenville division. The Greenville division at the time of the petition employed about 600 pipefitters at various projects. (Pet. 79–84.)[2] For a period of sev-

[1] United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.

[2] The Board determined that certain pipefitters not in the Company's employ at the time of the petition had a substantial continuing interest in the Company's conditions of employment because of their intermittent employment on the Company's construction projects and their expectancy of future employment. It therefore extended voting eligibility to employees in the bar-

eral weeks prior to the election, scheduled for November 16, 1961, Executive Vice President Buck Mickel and Mechanical Department Manager Theodore Johnson, accompanied by Personnel Director Barrington King, toured the job sites and spoke to groups of pipefitters about the election. They visited about 15 projects and made between 25 and 30 speeches. Mickel, who always spoke first, had no written speech but attempted to give the same talk each time. Johnson covered any points he thought needed further explication. (Pet. 46–47, 51, 52; J.A. 339–345, 399–400.)[3]

Mickel and Johnson stressed in their speeches (1) that the Company would lose business if unionized; (2) that the Company was able and willing to keep the pipefitters at work under existing conditions; and (3) that the election would be futile because of the Company's intention to continue hiring "at the gate" and to litigate for years the propriety of the Board's election order (Pet. 46–55). For example, Mickel told 140 pipefitters at one project that the Company did not think that it "could compete or get as many jobs as [it] would without being union," but that the men could expect continued employment when the job was over if the Company "remained non-union" and that they should contact their foremen about jobs; that the Company "regardless of how the election went" would continue to hire its employees "through

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gaining unit who had worked for the Company for 30 days or more during the preceding 12 months, or for 45 days or more during the preceding 24 months including some time during the preceding 12 months. (Pet. 82–84.)

[3] "J.A." refers to the Joint Appendix in the court below.

the gate, without coming through a business agent"; and that, if the Union won the election, the Company would protest the "absentee ballots" and "keep it in court for from eight to ten years" (Pet. 48; J.A. 129–130). Johnson told the employees at another project that "industry is coming south to get away from the Union" and that the Company was "negotiating a lot of jobs now" which the employees would not get "if we vote to go union"; that their foreman would hire anyone who wanted to go with him to another project when the present job ended, but the Company would never hire through a union business agent; and that the Company had been assured by its lawyers that they could keep the matter of voting at the election "in court for ten years if necessary" (Pet. 47; J.A. 113). At two other projects, the pipefitters were told by Mickel and Johnson that the Company's customers preferred a nonunion contractor and that the Company felt it would not get as many jobs if it were union; that the Company would continue to hire at the gate even if the Union won the election; and that the Company would tie the election up in court for a number of years (Pet. 46–47, 49, 50; J.A. 140–141, 149–150, 175–176, 234–236).

Also during the pre-election period, foremen at one project told employees that they had been instructed to find out how they felt about the coming election and report back to management (Pet. 55–56); a foreman at another project polled his men several times on whether they were "for or against" the Union (Pet. 43); and foremen at several projects questioned employees about their union views and threatened

employees with economic reprisals because of their union activities (Pet. 42–43, 56–59, 61–65).

The election was held as scheduled on November 16, 1961, and the Union lost by a vote of 684 to 247 (Pet. 45; J.A. 23).

B. THE BOARD'S DECISION AND ORDER

The Board found that the pre-election speeches of Vice President Mickel and Mechanical Department Manager Johnson violated Section 8(a)(1) of the Act because, considered as a whole, they threatened the employees with loss of employment if the Union won the election and promised them continued employment if the Union were defeated (Pet. 41, 67–68). The Board also found that the Company further violated Section 8(a)(1) of the Act by instructing foremen to inquire and report on the union views and sympathies of its employees, by coercively interrogating and polling employees concerning their union views, sympathies, and voting intentions, and by threatening employees with economic reprisals because of their union activities (Pet. 42–43, 66–67).

The Board ordered (Pet. 44, 75–77) the Company to cease and desist from the unfair labor practices found and from any like or related misconduct, and to post appropriate notices.[4]

C. THE COURT OF APPEALS' DECISION

The court of appeals (Judge Bryan dissenting) concluded that substantial evidence supported the

[4] The Board, in the representation proceeding which was consolidated for hearing with the unfair labor practice case, also sustained the Union's objections to the November 16 election and set it aside (Pet. 41, 68–69, 77).

Board's unfair labor practice findings and enforced the Board's order (Pet. 27–36). It further held that it had no jurisdiction to review the representation case (see n. 4, *supra*), and dismissed the Company's petition for review insofar as it challenged the Board's determination of voting eligibility in the November 16 election and its action in setting aside that election (Pet. 25–27).

ARGUMENT

1. The court of appeals sustained the Board's finding that the Company's pre-election speeches considered as a whole threatened the pipefitters with loss of employment if they selected the Union as their collective bargaining representative in the coming Board election and promised them continued employment if they rejected the Union (Pet. 30–31). In these circumstances, the Company's contention (Pet. 5–12) that the speeches were only an expression of views and opinion privileged by Section 8(c) of the Act presents solely an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. A different conclusion is not required by the Company's contention (Pet. 6–12) that the speeches could not be found to contain threats or promises of benefits because, separately considered, the statements made were all privileged. As the court of appeals pointed out: "Words and phrases, each lawful when considered alone, can be united in such a fashion as to yield an improper end product" (Pet. 30). The Board and the court of appeals

reasonably held that the statements here were so united.[5]

2. There is no merit to petitioner's contention that the court of appeals had jurisdiction under Sections 9(d) and 10(f) of the Act to review the voter eligibility rules set forth in the Board's decision and direction of election in the representation proceeding (Pet. 12–15). As the court of appeals pointed out, those sections of the Act permit a court of appeals to review Board action in a representation proceeding only "when review is sought in an unfair labor practice case which is based in whole or in part upon a Board certification in a representation case" (Pet. 25). *National Labor Relations Board* v. *Falk Corporation,* 308 U.S. 453; *A.F. of L.* v. *National Labor Relations Board,* 308 U.S. 401; *National Labor Relations Board* v. *Int. Brotherhood,* 308 U.S. 413; see *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 479. The representation decision here did not form the basis of the unfair labor practice order before the court of appeals. Petitioner will have an opportunity to have its contentions respecting the election reviewed when, and if, the Union wins a second election, is certified, and the Board orders petitioner to bargain based on that certification. Petitioner's reliance (Pet. 13–14) upon *Leedom* v. *Kyne,* 358 U.S. 184, is misplaced; that case concerned district court jurisdiction, the Court

[5] It may be noted that, even apart from the speeches, the Company's other coercive conduct (pp. 4–5, *supra*), which is not contested here, furnishes substantial support for the Board's order.

expressly noting that no question of the jurisdiction of the courts of appeals to review Board orders under the Act was involved (at p. 188).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
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DOMINICK L. MANOLI,
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National Labor Relations Board.

JULY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965